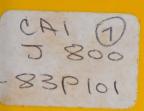




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WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION

Report # 1

PORNOGRAPHY AND PROSTITUTION IN DENMARK, FRANCE, WEST GERMANY, THE NETHERLANDS AND SWEDEN

by J. Kiedrowski and J.M. van Dijk

POLICY, PROGRAMS AND RESEARCH BRANCH RESEARCH AND STATISTICS SECTION





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PORNOGRAPHY AND PROSTITUTION IN FRANCE, THE NETHERLANDS, WEST GERMANY, DENMARK AND SWEDEN

John S. Kiedrowski Jan, J.M. van Dijk

November 1, 1984

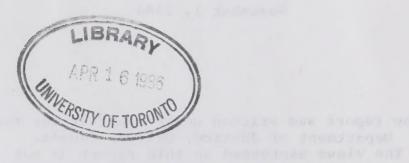
The report was written under contract for the Department of Justice, Ottawa, Canada.

The views expressed in this report do not necessarily represent those of the Department.

PORNOGRAMY AND PROSTITUTION IN TRANCE.

IN TRANCE.

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ADDENDUM

THE NETHERLANDS (P.80):

The proposed Bill on ponorgraphy (1979) was amended during the month of November 1984 by the Second Chamber of the Parliament of Netherlands. The amendment on the protection of minors prohibits the depiction of minors under 18 years of age in pornography.

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Numerous people who were under constrained schedule have contributed their valuable time to provide information on the different countries. In particular, we are indebted to Ms. Francoise Lombard from France, Ms. Edda Wesslau from West Germany, Mr. Jan Vilgeus from the Ministry of Justice, Sweden, and Prof. B. Kutchinsky from the Institute of Criminal Science, University of Copenhagen, Denmark.

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Responsibility for our errors or shortcomings in the report rest entirely with us.

J.S. Kiedrowski Jan J.M. van Dijk

November 1, 1984

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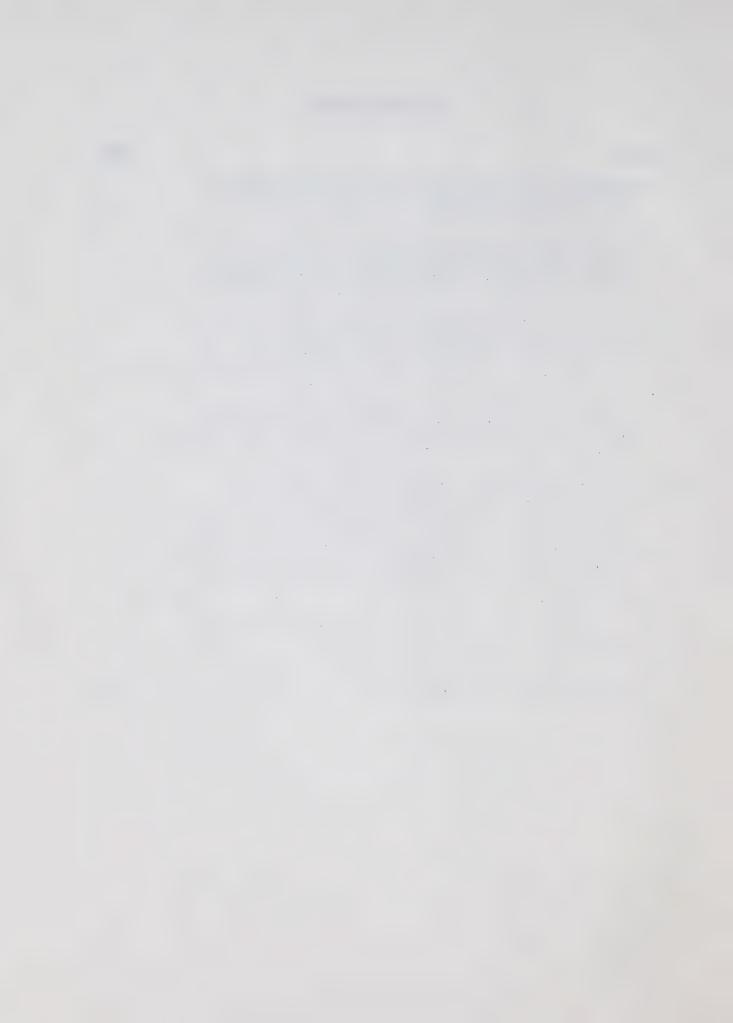
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CHAPTER I INTRODUCTION

1. Introductory Remarks

This report describes the results of a study on five European countries; namely, Denmark, France, West Germany, The Netherlands, and Sweden. The study was commissioned by the Department of Justice of Canada in support of its indepth review of these areas of laws, to aid in making effective policy decisions and to address the concerns of the Special Committee on Pornography and Prostitution.

2. Methodology

After reviewing a discussion paper prepared by the Special Committee on Pornography and Prostitution, and in consultation with individuals from the Department of Justice in Canada, these five countries were selected because of their experiences in the development of laws and social policies relating to pornography and prostitution. A questionnaire was prepared for individuals known to be knowledgeable on the subject area in the selected countries. The questionnaires were sent to and answered by the following persons: B. Kutchinsky in Denmark, E. Wasslau in West Germany, F. Lombard in France, Jan van Dijk in The Netherlands; and, Jan Vilgeus from Sweden.

The questionnaire on pornography and prostitution consisted of two separate sections. Each section contained several items related generally and specifically to legislation; law enforcement policies and practices; social policies; public opinions; and present trends in legislation, jurisprudence and policy. Respondents were asked to answer each question by making reference to government documents, crime statistics, and research reports. In addition, interviews were conducted by some respondents with, for example, public prosecutors or police officers.

To avoid any problems relating to ambiguity in the meaning of prostitution and pornography, the following working definitions were used. Pornography was defined as

"materials (publications, films, etc.) and, or, performances of a sexual nature considered to be obscene or indecent, "while prostitution referred to sexual services for financial rewards and acts directly related to it such as operation of bawdy houses (brothel), or living off the avails (pimps)."

Based on the information provided by these respondents, the present report was written. The chapter on Denmark, however, was largely written by B. Kutchinsky himself.

3. Structure of the Report

The report is organized in the following manner. experiences with pornography and prostitution in each of the selected countries are described in five separate chapters. The first chapter is on France, followed by the the Netherlands, West Germany, Denmark and Sweden. Each chapter begins with a very brief introduction on the constitutional and legal structure of the country at issue. Next, each country's experiences with pornography and prostitution are described in two separate sections and these sections are then divided into three main parts. First, a brief historical overview is presented on legislation and jurisprudences. In the second part, information is given on the size and nature of the problems of law enforcement, and other policies. Crime statistics are presented to depict the situation whenever this information was available. In the final part the attitudes of the public at large; the women's movement; particularly towards the policies; and possible future developments on the subject matter are discussed. The references from each country are located at the end of each chapter. The report ends with two summaries and some concluding remarks on the European experiences with pornography and prostitution respectively.

CHAPTER II

EXPERIENCES WITH PORNOGRAPHY AND PROSTITUTION IN FRANCE

1. Introductory Remarks

The Republic of France is a highly centralized governed state with approximately 50 million inhabitants. The constitution provides for a strong executive branch headed by the President and a legislature composed of a National Assembly and a Senate. The President is elected for seven years and, in turn, appoints the Prime Minister. The highest court is the Cour de Cassation, while the highest administrative court is the Council of State. The Republic is divided into departments, governed by a prefect, who is appointed by the President and an elected council. The Mayors of the cities are also elected. Criminal proceedings may only be instituted by the public prosecutors who are responsible to the Minister of Justice. French law recognizes the principle of expediency.

2. Pornography

2.1 Legislature and Jurisprudence

2.1.1 Legislation

The French Penal Code contains Section 283 prohibiting the dissemination of material which is "outrageous to good morals." This prohibition was already part of the original Penal Code of 1810 and later modified in 1939.

Section 283 reads:

any person who manufactures or holds for sale, distribution, lease display or exposition, knowingly imports, causes to be imported, exports, causes to be exported, transports or causes to be transported for a like purpose,

displays, exposes, or subjects to the public view, sells, or leases, even though not publicly, in any manner, directly or indirectly offers, even though gratuitously or privately, distributes or delivers for distribution in any manner, any printed matter, writing, drawing, sign, engraving, painting, photograph or cliché, phonograph record, emblems or any other object or representation, outrageous to good morals, will be punished by imprisonment from one month up to two years and a fine of \$60 (Cda), not exceeding \$5,000 (Cda).

The term "good morals" is restricted to refer to sexual morals. The term "outrageous to good morals" however, has a wider meaning than "obscenity." According to the French Supreme Court, pictures which incite sexual feelings can be outrageous to good morals without being obscene.

Since 1961, special rules of procedure apply to prosecutions and seizures involving books that print the name of the author and publisher. Under Section 283 of the Penal Code, prosecutors must consult with a special committee consisting of representatives from the Association of Writers and the National Union of Associations for Family Affairs before criminal proceedings can be taken against such books. The committee's opinions however, are not binding.

A law dating back to 1946, entitles the Association of Writers to ask for a review of a book twenty years later, after it had been found to contravene Section 283. This procedural rule was applied to some of the books written by C. Baudelaire (les Fleurs du Mal).

Section 284 prohibits the singing or other oral presentation in public of texts which outrage good morals and the public advertisements for licentious activities. Section R-38(9) of the Penal Code specifically prohibits "the display of indecent pictures or posters in or, at the public road or, in public places." The concept of indecency is to be interpreted with a view to the sexual feelings of the young.

In 1949 a law was enacted (which was later modified in 1960), introducing a special section for protecting youths against certain publications or the presenting of dangerousness. Publications primarily designed for youth may not "present debauchery in a favourable light" nor any criminal act or other form of anti social behaviour (e.g., racism). If the publication was published in a journal, then that journal can be prohibited from being sold for a period not exceeding two years. The authority to prohibit these publications is given to a special Committee for the Surveillance and Control of Publications Designed to Protect the Youth. The committee is entitled to bring to the attention of the public prosecutor any contraventions of this prohibition and to make suggestions to the Minister for Interior Affairs concerning books which ought to be banned. The committee's opinions, however, are not a condition for a prosecution.

In addition, the Minister for Interior Affairs has the authority to prohibit the dissemination of publications of any kind that are "dangerous for the young on account of their licentious or pornographic character or the place given to crime or violence." To

protect the youth, the Minister can impose a ban on the distribution and, or, public display of, and, or, advertisement of such a publication. Editors whose publications were banned for more than three times during a period of twelve months, are under the obligation to present three copies of all new publications to the Ministry of Justice three months prior to their appearance in public.

The authorities from larger towns have further enacted regulations concerning kiosks which prohibit the sale and public display of publications or pictures which are indecent or outrageous to good morals (e.g., regulation of 17 October 1953, Paris).

Since 1810, the French Penal Code contains a Section prohibiting all acts or gestures performed in public which "outrage the norms of decency" (Section 330). The legislator however, has not given a more detailed definition to the elements of this crime. Consequently, the courts have developed a set of standards for the interpretation of this Section. In principle, both live performances and nudism on the beach are covered under Section 330.

2.2 Major Jurisprudence Issues

The Penal Chamber of the Supreme Court has decided that all texts or images which incite sexual feelings can in principle, be considered as "outrageous to good morals" (Crim. 8, Jan., 1959). They can be considered outrageous to good morals in particular cases where "they contravene generally accepted standards of decency in such a way as to provoke the indignation and

condemnation of the public" (Court of Appeal, Paris, 12 March 1958). In determining the decency standards of the community, the courts "have to take into account all manifestations of the public's opinions and particularly, the opinions expressed by groups of concerned citizens (Court of Appeal, Paris, 10 June 1977).

According to the Supreme Court, tolerant administrative policies can never abrogate penal prohibitions like the ones in Section 283 (Crim. 4 May and 13 March 1957). In 1972 the Besançon Court of Appeal however, decided in 1972 that the sale of pornography in a specialised shop where minors are not admitted, and where the merchandise is not displayed exteriorly, does not constitute an offence under Section 283 (Court of Appeal, Besançon, 9 May 1972) on the grounds that the government has explicitly declared that such shops are not against the law. A similar decision concerning a "sex shop" was made by the Court of Appeal of Reims (Court of Appeal, Reims, 7 October 1977). The latter court decided that anyone who does not enter such a shop could not possibly be offended by it; that access was denied to minors, and that "the existence of such businesses is now accepted by the public at large."

With regard to the offence of Section 280 (exhibitionism) the courts have traditionally decided that live performances in theatres are not outrageous to norms of decency as long as the performers do not expose their sexual parts or make obscene gestures. The Supreme Court has never expressed an opinion on this subject. The court had decided in 1965 however, that the wearing of a so called monokini constitutes an offence under Section 280 (Crim., 22 December 1965).

2.3 Film Censorship and Related Issues

The production and presentation of films are covered under Section 283 on "pornography." In addition, the film industry is subject to several regulatory schemes. First, all films made for public presentation are screened by a Special Commission for the Control of Films consisting of representatives from various ministries, the cinematographic profession and other relevant professions. The Commission can recommend to the Minister of Information to ban a film altogether, or to impose an age restriction of 18 years or 13 years. The Minister, however, is not bound by the Commission's recommendation.

The Council of State decided in 1975 that the Minister, in making decisions on licenses for films must weigh the interests of the community against the human rights of the producers of the film and, especially, against their fundamental freedom of expression (C. of S., 4 January 1975). Consequently, the discretionary power of the Minister is presently much more limited than in the past.

The Mayors are generally not entitled to prohibit the presentation of pornographic films. The Mayor however, may stop the presentation of a particular film if it is a threat to public order (Counsel of State) opinion of 9 May 1950). According to a later decision by the Council of State (Counsel of State, 9 April 1960), such a proscription is justified only if the film has an immoral character according to the Council's (national) standards, and if the local situation specifically demands it (e.g., when several different sections of the local community have protested against the presentation of a film).

In accordance with a law dated December 30, 1975, France has adopted a special set of fiscal provisions on pornographic films and films which incite to violence. These include: a higher tariff of added value tax is imposed upon the sale of such films and upon the admittance fees of cinemas presenting them; a special tax of approximately \$40,000 Cda. is levied on pornographic films imported from other countries; a special tax is levied on the profits made by the production, distribution and presentation of pornographic films; and, the law excludes any financial support by the government in the production, distribution and presentation of pornographic or horror films.

The Minister of Information, who is responsible for the cinemas, is authorized to classify a film as pornographic or violent (classification X) after having consulted the Commission for the Control of Films. These provisions are applicable to all films available for presentation in France regardless of whether they have been licensed or not. The Council of State has developed a standard to classify films which is to be applied by the government and the Commission. A film can be classified as pornographic if it presents, without aesthetic finesse and in a provocatively realistic way, sexual scenes, notably, sexual intercourse.

In 1979, the Supreme Court decided that films classified by the government as pornographic and, thereby, made subject to special fiscal provisions, do not constitute an offence under Section 283. The law of December 30, 1975 has waived such films from existing prohibitions. According to the Supreme Court, this law legalizes films which offend a part of the population's moral feelings due to their obscene character.

This law however, does not legalize films where the contents essentially consist of detailed depictions of acts of violence and sexual perversions, which degrade human beings and therefore, are outrageous to good morals (Crim., 25 January 1979). Consequently, the Court's decision has limited the scope of Section 283 to include films degrading to human beings because they depict acts of violence and sexual perversions.

2.4 Law Enforcement Policies

The office of the public prosecutor has gradually adopted a rather tolerant prosecution policy on the sale of pornographic materials in specialized shops or kiosks. Live performances of various sorts, especially in Paris, also seem to be tolerated.

According to reports from the National Union of Associations for Family Affairs (to be discussed later), and the Committee for the Surveillance and Control of Publications Designed to Protect the Youth, made recommendations to the public prosecutors or Minister of Justice on dangerous publications but, are quite often ignored. Recently, very few films were altogether banned by the Ministry of Information (Culture) while the Commission for the Control of Cinemas and the Minister have become more tolerant towards ordinary erotic films. An increasing number of such films are not even classified as X-rated. On the other hand, the Commission and the Minister tend to be increasingly critical of films depicting extreme acts of violence or sadism.

In Table 1, an overview is presented of the number of convictions for the various relevant offences relating to pornography.

TABLE 1

Number of Convictions for Four Categories of Pornography Offences" in France between 1961 through 1978

			"Dissemin-	
Year	Sec. 330 "exhibitionism"	Sec. 283, 84 "pornog- raphy"	ation of Porn- ography Among the Youth" (Law of 1949)	
1961	4,554	234	-	_
1962	4,408	351	-	_
1963	4,750	347	-	-
1964	4,769	282	-	-
1966	5,523	204	189	4 3
1967	5,488	163	209	3
1968	4,599	154	170	13
1970	3,466	177	192	66
1972	3,637	222	130	50
1974	2,017	113	162	5
1976	3,352	133	110	4
1978	2,404	55	216	3

Table 1 illustrates that both the number of convictions under Section 330 (acts of exhibitionism) and Section 283, 84 (pornography) have drastically declined. Of the 3,466 persons convicted for "exhibitionism" in 1970, 2,648 were sentenced to imprisonment for an average of three months. Of the 177 persons convicted of pornography offences in 1970, 147 were sentenced to imprisonment for an average of three months.

Table 2, illustrates the sentences imposed for the four categories of relevant offences in 1978.

TABLE 2

Sentences Imposed for "Exhibitionism," "Pornography,"
"Dissemination of Pornography Among the Young,"
and "Publications Designed for the Young"
in France for the year 1978

Type of Offence	Imprisonment	Suspended Imprison- ment	Totals	Recidi- vists
Exhibitionism Section 230	255	1,207	2,404	533
Pornography Section 283,84	0	10	55	18
Dissemination Among the Young (Law of 1949)	92	79	216	60
Publications Designed for the Young	. 1	0	3	1

2.5 Public Opinion and Current Policy Trends

Section 289 of the Penal Code, entitles associations of concerned citizens who have been formally acknowledged by the government to enter criminal proceedings on their own account (i.e. operate as party civil in a criminal trial) for cases under Sections 283 to 289. The Minister of Justice and Interior Affairs, for example, have registered the Provincial Unions of Associations for Family Affairs as organizations that can exercise these rights but, very seldom bring proceedings under these Sections. These Provincial Unions are united at the national level with the National Union of Associations for Family Affairs. This Union regularly publishes reports or memorandums

on pornography. According to one of these reports, between 500 and 670 of the 4,700 films presented in France in 1974 belonged to the category "pornographic" and in 1975, approximately 20% of all visitors of cinemas went to presentations of pornographic films (annex to report nr. B839, 20 January 1976). The Union concluded that the present interest of the public for such films would probably gradually diminish.

In a letter sent to the Prime Minister in 1982, the Union expressed its opinion about the recent boom in films portraying acts of extreme violence. The Union recommended the retention of the age limit of 18 years for such films and for all films classified as X-rated. In a memorandum dated July, 1983, the Union (Annexe no. 2 à la LO nr. 54.444) gave an analysis of the sudden increase in pornographic video films. The Union claimed that twenty to twenty five percent of all video films sold in France are "pornographic," and approximately twenty percent of the video films are produced illegally (i.e., in contravention of the laws on copyright).

According to this memorandum, the Law of December 1975 (which introduced a special fiscal regime for pornographic films) has had several effects upon the market for pornographic films: the importation of foreign pornography into France has decreased; the presentation of pornographic films is now largely restricted to specialized cinemas, consequently, fewer women view such films; the quality of pornographic films has deteriorated; and in the period 1975-76, large film companies have ceased to produce pornographic films.

The Union observed that the number of viewersof pornographic films has collapsed, whereas horror films and films depiciting extreme acts of violence now attract alarmingly high numbers of visitors. At the same time, the market of video films has become the centre of social demand for all forms of pornography. According to the Union, women would form a substantial part of the customers of these video films. The Union urged the government to make the production, distribution and presentation of pornographic video films subject to the same fiscal and licensing regulations as other films.

Several members of Parliament have urged the Minister for Cultural Affairs to take legislative steps in order to regulate the dissemination of pornographic video films (Journal Officiel N18-AN-2, May 1983; Journal Officiel-Debats Parlementaires Q-5, May 1983). As a result of this pressure by the Union and members of Parliament, on December 29, 1983, a law was enacted imposing the same severe fiscal regime as upon normal films, on pornographic video films. Although the Union agreed to the enactment of this law they further urged the government to expand the scope of the screening and licensing regulations to encompass all video films.

3. Prostitution

3.1 Legislation and Jurisprudence

Before 1946, prostitution was regulated by means of a system of registration. Prostitutes who worked in bawdy houses (<u>maisons de la tolérance</u>) were registered by the police while the houses themselves were licensed and controlled by local authorities. Prostitutes work-

ing outside brothels, were registered by the police after they had been arrested for a second time for solicitation. All registered prostitutes were obliged to undergo a medical examination twice a week. cities had municipal bylaws providing an elaborate system of prescriptions and proscriptions concerning the behaviour of prostitutes. On April 13, 1946, a law was passed abolishing the system of registering known prostitutes and licensing bawdy houses. Until 1960, a national registry of known prostitutes was still kept by the national health authorities as an instrument for tracing down prostitutes afflicted with venereal diseases who did not receive medical examinations. This registry was finally abolished on the grounds that it impeded the social reintegration of prostitutes and was not an effective method for control.

The Penal Code of 1810 contained a Section on procuring of minors and enticing minors into prostitution. In the 20th century, several prohibitions of procuring and living off the avails were gradually added to the Penal Code (1903, 1940, 1943). In 1946, all forms of involvement in the operation of bawdy houses were criminalized. The latter prohibitions were extended in 1960 and 1975. The Law of 1946 also introduced a national prohibition of street solicitation which was later amended in 1958.

Presently, the Penal Code distinguishes seven different forms of procuring or living off the avails, jointly called "proxénétisme." Section 334 makes anyone liable to imprisonment, not exceeding three years, who:

- in any way willfully aids, abets or fosters the prostitution or pimping of others;
- 2) who in any way partakes in the profits of the prostitution of others or receives support from a habitual prostitute;
- 3) who knowingly cohabitates with a habitual prostitute;
- 4) who maintains a personal relationship with one or more prostitutes and whose way of live is out of proportion with his own sources of income;
- 5) who recruits, induces or keeps any person, with or without his approval, for prostitution or who leads such a person to prostitution or debauchery;
- 6) who in a professional way serves as an intermediary between prostitutes and those who exploit or pay for the prostitution of others; and,
- 7) who by way of threats, pressure, ruses or any other way, obstructs the activities of prevention, control, support or reeducation undertaken by associations for the benefit of prostitutes or persons at risk of becoming prostitutes.

Section 334(1) enumerates the special circumstances of the offence making the perpetrator liable to imprisonment from two years not exceeding ten years when (aggravating factors):

- (a) the offence is committed with a minor;
- (b) the offence is committed by means of threats, coercion, acts of violence, undue influence or fraud;
- (c) the perpetrator was bearing a weapon openly or concealed;
- (d) the perpetrator is the spouse, father, mother or guardian, or has any other form of authority over the victim;
- (e) it is part of the perpetrator's official duties to participate in the struggle against prostitution, the protection of health or the maintenance of public order;

- (f) the offence was committed against several persons;
- (g) the victims were induced or incited to prostitution outside the territory of the Republic;
- (h) the victims have been induced or incited to prostitution at their arrival in France or shortly after their arrival;
- (i) the perpetrators have committed the offence collectively as associates or accomplices.

A separate Section makes it an offence to incite minors under the age of eighteen to debauchery or to foster their corruption habitually or to do so occasionally with minors under the age of sixteen (Section 334(2)). Since 1946, the Penal Code contains a scheme of offences on premises used for prostitution aimed at the total repression of all manifestations of the "maisons de la tolérance" (bawdy houses). Section 335 makes anyone liable to imprisonment or two years not exceeding ten years, who:

- (a) personally, or by agent, maintains, runs, exploits, manages, makes functioning or partially or wholly finances a house of prostitution;
- (b) personally, or by agent, maintains, runs, etc., a hotel, furnished house, boarding house, bar, restaurant, club, association, dancing, amusement hall or any other place accessible to the public or used by the public, and habitually accepts or tolerates that one or more persons prostitute themselves in these premises or solicit for the purpose of prostitution.

In addition, Section 335(6) makes anyone liable to imprisonment of six months, not exceeding two years:

(a) lets private premises to one or more persons, knowing that they will practice prostitution in them; (b) who has the disposition over private premises for any reason and who renders or leaves them at the disposition of one or more persons of whom he knows that they practice or will practice prostitution in them.

The same Section gives the office of the public prosecutors the authority to inform the owners or landlords that their premises are used for prostitution. This obligation has the dual objective of prompting these persons to take action against such practices and of preparing evidence against the landlords if no action is taken. Finally, Section 335(6) obliges the judge deciding a case to terminate the letting contract and to expel the tenants, subtenants, or occupants who practice prostitution at the request of either the owner, the principal occupant or a neighbour in cases of habitual prostitution.

Several extra penalties must, or can, be imposed by the courts upon those convicted for one of the offences under Sections 334 and 335. In all cases, such persons lose the right to be employed by or to be commercially involved in any manner with the hotel and catering industry for the rest of their lives (Section 335(7)); all persons convicted under these Sections lose their civil rights (e.g., the right to vote or to be employed as a civil servant) for at least two years; the judges can proscribe the accused from taking a holiday for at least two years (restrict their freedom of movement); and confiscate all their profits from prostitution (Section 335(1)(3)).

The Penal Code recognizes three extra penalties which may be imposed upon those convicted under Section 335 (running of bawdy houses). The judge can either order the closure of the establishment; withdraw its

license; or confiscate its total capital. In cases of recidivism of the convict or of the establishment concerned, the judge is bound to confiscate the capital.

Before imposing these extra penalties, the judge must assure himself that the office of the public prosecutor has informed the owner or license holder of the establishment at issue of the prosecution. These persons must be informed of the date of the trial. They are entitled to submit evidence to the judge and to appeal against the imposition of one of the three extra penalties.

The Penal Code penalizes with fines, public solicitation for the purpose of prostitution. Section R-40(11) prohibits public solicitation for debauchery by means of gestures, words, texts, or by any other means (e.g., active solicitation). Section R-34(13) makes liable to a fine between \$50 and \$100 (Cda), anyone whose attitude on the public road is such as to solicit for the purpose of debauchery. According to the Supreme Court, an example of this section being violated is if a woman stands and loiters on the public way and incessantly looks at the passers-by (Crim. 28, November, 1962).

Finally, according to the prevailing doctrine, the mayors and police may not enact police regulations or any other bylaws which impose proscription upon prostitutes other than the ones contained in the Penal Code.

3.2 Law Enforcement and Other Policies

3.2.1 The Size and Nature of Prostitution

Although no official statistics on the number of prostitutes are available, the total number of

prostitutes in France is estimated at 100,000 of which 30,000 are professionals. No reliable estimates have been found on the number of minors prostituting themselves. Studies among such prostitutes have shown that the majority of them have taken up prostitution before they were seventeen (Le Moral, 1969; Feschet, 1975). Among the prostitutes studied, 38% of them have had their first sexual experience before they were thirteen.

Male prostitutes make up 0.5 to 1 percent of all prostitutes and it appears that the number is rapidly growing. Most professional prostitutes in France practice street prostitution. The recent closing down of most hotels previously used by prostitutes, has induced an increasing number of them to rent or buy rooms to receive their customers. No "eros centres" exist in France. According to the police, at least 45,000 persons per day go to a prostitute in Paris. The tariff varies from \$10 Cda. (Saint Denis) to \$100 Cda. (Champs Elysees). According to the Ministry of Interior, most prostitutes are supervised by pimps. In 1975, the Ministry estimated the total profits of the 15,000 pimps and procurers working in France (35-40% in Paris) at \$1.2 billion (Cda) while their profits in 1983 are estimated at \$1.6 billion (Cda).

3.2.2 Law Enforcement Policies

After the closure of bawdy houses in 1946, the prostitutes went to the streets. Many of the owners of former bawdy houses opened hotels and started to rent rooms to prostitutes. Since 1960,

the police have intensified their efforts to repress these new forms of procuring. In 1975 however, a committee of the senate concluded that the laws on procuring and solicitation were poorly enforced (Tailhaides and Vircipoullé, 1975). At the end of the seventies, a large number of the "hotels de passe" were finally closed down. During the seventies, the police also intensified their efforts to enforce the law on solicitation.

According to Mr. Guy Pinot, President of the Court of Appeal of Paris, the continuous police raids among street prostitutes amounted to a real chasing around of prostitutes (Pinot, 1975). Some prostitutes are regularly sentenced to fines of \$200 (Cda).

In response to law enforcement policies, large numbers of prostitutes occupied several churches in Paris during the summer of 1975 in order to draw attention to their problems. Later in the same year, some 600 prostitutes assembled in Paris in a meeting of protest. However, the police have not relaxed their enforcement policies on street solicitation.

Table 3 presents the number of convictions for procuring (Section 334, 2-7), assisting a prostitute (Section 334-1), running a bawdy house (proxénétisme hôtelier) and active or passive solicitation.

Number of Convictions for Procuring, Assisting a Prostitute, Running a Bawdy House and Solicitation in France during the period 1961 through 1978

<u>Year</u>	Procuring	Assisting a Prostitute	Running a Bawdy House	Solici- tation
1961	1,256	-	- .	300
1962	1,266	comp		447
1963	1,445		-	546
1964	1,600	_		376
1966	1,184	325	-	1,138
1967	1,058	299	•	2,018
1968	940	13	247	1,898
1970	889	18	159	2,439
1972	999	24	179	1,463
1974	1,086	26	299	2,034
1976	1,081	22	230	2,846
1978	1,276	95	195	3,708

Table 3 shows that at the end of the seventies, the number of convictions for procuring and solicitation have increased. In 1978, two thirds of all convictions for procuring were sentenced to unsuspended imprisonment (on average of one year) while the common penalty for (passive) solicitation is a fine between \$50 and \$100 (Cda).

3.2.3 Social Policies

On November 25, 1960, a law was introduced extending the prohibitions of procuring and solicitation and putting an obligation upon all provinces to establish social services for the benefit of those at risk to become prostitutes. This law further encouraged the establishment of special homes for former prostitutes. According to later legislation, such centres may provide lodgings,

meals, medical care, education and professional training for their guests. In 1974, the rules of admission to those establishments were modified to minimize the stigmatizing effects of the centres admitting several other categories besides former prostitutes. In spite of the legal obligations to establish special social services for prostitutes, at present, only six provinces have such services.

On April 9, 1975, a law officially entitled acknowledged associations for the aid of prostitutes, to act as private parties (party civil) in criminal trials on procuring and to demand compensation from the defendants for the harm done. Since the enactment of this law, the Association of Action Groups Against Trafficking in Women and Children has actually acted as a private party in more than one thousand trials of procurers. Recently, the association received between \$8,000 and \$12,000 (Cda) annually by way of compensation from procurers. These sums do not cover however, the association's expenses made on behalf of (former) prostitutes.

Besides this very active association, which played a major part in the closure of the "hotels de passe" in Paris in 1979-1980, there are several other private associations in aid of prostitutes, including one with a twenty-four hour telephone service (SOS Prostituée).

¹ Esclavage-Document Social, journal published by the association, No. 28, III, 1980.

3.2.4 Public Opinion and Current Policy Trends

A report on prostitution by Mr. Pinot in 1975, revealed that many prostitutes felt victimized by the policy of tax collectors to impose taxes on them over the present and four preceding years if no taxes have been paid. In relation to this fiscal policy and the penal fines imposed upon them, the prostitutes have coined the term "governmental pimping" (proxénétisme d'Etat).

In response to the social problems caused by street prostitution and culminating in public protests by the prostitutes, a private members' Bill was presented to Parliament in 1978, which sought to reopen the traditional maisons de la tolérance. This Bill however, was rejected.

An opinion poll, conducted by the French Institute of Public Opinion (l'IFOP) in 1978, showed that 71% of the French population is opposed to the prohibition of prostitution, 50% is in favour of the reopening of bawdy houses (71% of those consider this to be in the interest of the prostitutes), and 59% view prostitution as a necessity (especially males, 66%; urban dwellers, and the higher social classes).

According to formal statements made in 1981 (August 17 and September 14), the present Minister Responsible for the Rights of Women, Mme. Roudy, is determined to continue "the struggle against prostitution." The Minister noted that police forces will be expanded with specialized officers for the struggle against procuring and prostitution and special efforts will be made to combat the internationally organized forms of procuring, in

accordance with decisions made by the European Parliament.

A committee of representatives from several relevant Ministries was established in 1981 to deal with the problems of prostitution, choosing as its policy goals the "demarginalization of prostitutes." In order to achieve this end, two approaches are recommended. First, the activities of prostitutes should be decriminalized as much as possible. The prohibition of solicitation ought to be reviewed and the existing prohibition to live together with a habitual prostitute (Section 334(3)). Secondly, the committee envisages the creation of services for the professional education of former prostitutes in order to facilitate their social reintegration.

Since 1983, the policies of the tax collector towards prostitutes have become less stringent; taxes over preceding years are no longer imposed upon former prostitutes. In 1983, a number of prostitutes established a formal association for prostitutes which aims at the formal and full acknowledgement of prostitution as a form of labour. The members of this organization demand that prostitutes be treated the same as other workers in the area of unemployment benefits, health insurance, on so forth. The Minister for the Rights of Women however, has declared that the present government will never accept the opinion that prostitution is a respectable form of labour.

CHAPTER III

EXPERIENCES WITH PORNOGRAPHY AND PROSTITUTION IN THE NETHERLANDS

1. Introductory Remarks

The Kingdom of The Netherlands is a constitutional monarchy and a unitary state with approximately 14 million inhabitants. The highest legislative body consists of two bodies: Parliament and the Senate (appointed by the provincial councils). These two central bodies have full legislative powers in all possible fields. The lower legislative bodies (the provincial councils and the city councils) cannot enact laws which contravene or overlap with state laws. The Council of State, which is an advisory committee to the government, can annul administrative decisions of the municipalities. Finally, the mayors for each city are appointed by the national government.

In The Netherlands, the criminal investigation departments of the various police forces are responsible to the public prosecutor. The prosecutors have the authority to withdraw proceedings against a defendant if the common interest does not warrant a prosecution. The public prosecutors are hierarchically organized. At the top of the structure is the assembly of prosecutors general, chaired by the secretary general of the Ministry of Justice, who represents the Minister of Justice. This body issues national guidelines for the investigation and prosecution of certain types of crimes. At the local level, the senior prosecutors have regular meetings with the mayors and chiefs of police. At the meetings, the public prosecutors consult their administrative counterparts on local prosecution policies and on individual cases that have a bearing on local administration (e.g., the prosecution of squatters).

2. Pornography

2.1 Legislation on Pornography

The original Netherlands Penal Code, contained a Section on pornography, but it only addressed pictorial materials. In 1911 however, all Sections on sexual offences were fundamentally revised to include new and more stringent laws. Although on several occasions these Sections were slightly modified, they are retained in the present Penal Code.

The Section on pornography prohibits the distribution, display, or exportation of any textual or pictorial material or object which "offends the norms of decency" (Penal Code, Section 240). A special Subsection further restricts the distribution or displaying of any such materials to a person under the age of eighteen. In addition, there is a separate Section that prohibits the distribution or displaying of any material likely to arouse the sexual feelings of any person under the age of eighteen (Section 451 bis). Section 239 of the Penal Code prohibits all acts which "outrage the norms of decency" that are performed in public or in the involuntary presence of others. This law on exhibitionism dates back to 1881 and has never been changed.

In 1977, the Law on Film Censorship of 1926 was repealed and later replaced by a law on the Presentation of Films. The enactment of this law abolished the procedures on screening and previewing films before they are shown in adult cinemas or on television. The cinemas however, are not allowed to show films to persons under the age of sixteen unless the films were certified by the National Board of Film Censorship, and

television broadcasting companies are not allowed to present such films before 21.00 hrs. The sole criterion for the Board's decision to have an age restriction is to protect the minors from the potentially harmful effects of the films. According to a memorandum, the Board is expected to particularly be on the alert for the presentation of acts of violence of a sadistic or otherwise perverted nature.

Finally, in accordance with the Dutch constitution, the right to freedom of expression precludes the enactment by local legislative bodies (e.g., city councils) of police regulations, or any other bylaws prohibiting textual or pictorial pornography. Some cities however, have enacted police regulations prohibiting the public display of purported "sex articles" such as sexual gadgets, stimulantia or erotic underwear. Since 1977, the mayors are no longer authorized to ban pornographic films in local cinemas.

2.1.1 Recent Jurisprudence

The High Court has continually reinterpreted the terms "offensive to norms of decency" and "outrage against norms of decency." According to the prevailing doctrine, any decision by the High Court on one of these terms is applicable to both Sections on pornography and exhibitionism. In 1970, the High Court decided that the term "norms of decency" is to be interpreted as what the large majority of the national population considers to be the standard of acceptance (The Chick decision¹). This interpretation of obscenity by the High Court can be viewed as

¹ M.R. 28-11-1978, NJ 1979, 93.

can be viewed as sociological. According to the High Court, the judge can either rely upon expert testimony or upon his own judgement in determining the opinion of the large majority of the national population.

In 1978, the High Court further decided that the presentation of a pornographic film to a voluntary adult audience, who was informed of the film's content in advance does not constitute an offence against the norms of decency as such persons cannot reasonably assert that they were personally offended by the showing (The Deep Throat decision2). According to the High Court, it is unreasonable to assume that anyone who attends a showing voluntarily can be offended. Based on this decision, the obscenity of a film is to be determined in relation to the circumstances of its presentation. The Deep Throat decision has further narrowed the legal concept of obscenity. The concept of obscenity is now effectively restricted to public displays of pornographic material and to its exposure to minors. Furthermore, live shows performed for adults in nonpublic places are no longer viewed as an indecent act in the legal sense.

2.1.2. Legislative Developments

In 1972, the Advisory Committee for Legislation on Sexual Crimes presented to the Minister of Justice

^{2 13-6-1972,} NJ 1973, 297.

Justice a report on pornography. The Committee considers the free expression of one's sexuality to be one of the basic human rights indirectly safeguarded by the United Nations Declaration on Human Rights and the Treaty of Rome. Within this view, the boundaries of the individual's right to express and experience his sexuality are to be determined exclusively by the interests of his fellow citizens. According to the committee, no evidence has been shown to illustrate that pornography has a harmful effect upon adults. As a result of this finding, the committee does acknowledge but two objectives for the law on obscenity: the protection of minors, and the prevention of unexpected confrontations.

The conclusions of the Committee's Report have had considerable impact on the jurisprudence of the High Court and on the investigation and prosecution policies of the public prosecutors. Furthermore, in accordance with the Advisory Committee's main recommendations for legislative changes, a Bill was presented to Parliament in 1979 to amend the laws on pornography. The Bill proposed to replace the existing Sections on pornography with the following revisions:

Section 240 states: anyone is liable to imprisonment not exceeding two months or a fine not exceeding ten thousand guilders (approx. \$5,000) who knows or has a serious reason to suppose that a picture or object offends the norms of decency, and

either displays it on or at a public place or mails it to an individual, unsolicited.

Section 240(a) states: anyone is liable to imprisonment not exceeding two months or a fine not exceeding two thousand guilders (approx. \$1,000) who distributes, offers or shows a picture or object, whose presentation to a minor can be considered harmful to persons under the age of sixteen, or to a person he knows or reasonably should have known to be under the age of 16.

In other words, the new Bill seeks to limit the prohibition of pornography to obtrusive forms of distribution and to lower the age of protecting minors from 18 to 16.

The same Bill, further seeks to repeal existing Sections on exhibitionism by introducing a law to prohibit the performance of indecent acts in public or in places accessible to minors. According to a memorandum explaining the purpose of the Bill, recreational nudism will not be considered indecent if it is performed on beaches or in other areas designated for that purpose by the local authorities. The Bill has been favourably received by most members of Parliament, but it has not yet been passed, mainly due to the critical opposition of feminist groups. In the last section of this chapter, we will discuss the feminist groups' opposition to the proposed Bill which is still pending.

³ Second Interim Report of the Advisory Committee on Legislation on Sexual Crimes, The Hague, 1972.

2.1.3 The Availability of Pornography

As the concept of pornography cannot explicitly be defined, it appears to be impossible to assess its prevalence in the Dutch society. Some indications of this however, can be presented. In 1977, the Research and Documentation Centre of the Ministry of Justice conducted a survey among the Mayors of 827 cities in The Netherlands regarding their city's experiences with commercial sex. According to the report, 4 there are approximately 500 specialized shops providing hard core pornography and sex articles distributed over approximately 100 cities. About half of these establishments also show hard core pornographic films. In addition, live shows, and, or, pornographic films are being presented in approximately 250 so called sex clubs. A large majority of the Mayors have indicated that over the past two years there had been no significant increases or decreases in the number of sex businesses.

According to a recent press publication, the sales of women's and men's magazines have declined since the early seventies. However, the sales of pornographic video cassettes, which are mostly imported from the U.S.A., have shown a sudden increase. An estimated 100,000 pornographic video cassettes are said to be sold annually in The Netherlands.⁵

At present, large sections of the Dutch beaches have

been assigned as nude beaches by the Mayors.

Ms. C. van der Werff a.o., Commercial Sex Business in The Netherlands, Research and Documentation Centre, Ministry of Justice, Oct. 1978 (in Dutch).

2.2 Law Enforcement Policies

In 1970, the Assembly of Prosecutors General issued national guidelines for the investigation and prosecution in the case of Section 240 of the Penal Code (pornography). The 1970 guidelines can be seen as an attempt to give a specific material definition to the legal concept of "an offence against the norms of decency." However, the adoption of the new more permissive standards of obscenity by the High Court in 1970 made these guidelines obsolete within a month after they were issued.

In 1976, the Assembly of Prosecutors General updated their national guidelines to reflect the new judicial standards of obscenity. The prosecutors were instructed to attune their law enforcement policies to those of local authorities. Prosecutions on pornography were to be initiated only if the acts or materials at issue are indecent according to the standard of the large majority of the national population; if the material was displayed in public, and if local members of the community have complained. In addition, the Assembly, anticipating the abolishment of film censorship for adults, gave instructions for initiating criminal procedures against cinemas with fifty seats or more who presented hard core pornography films. But the latter part of the guidelines were rendered inoperative by the Deep Throat decision of the High Court in 1978.

In 1979, a working group of prosecutors drafted a memorandum on investigation and prosecution policies of commercial sex businesses. Concerning pornographic acts or materials, the memorandum recommended a restrained law enforcement policy. This policy was to be directed exclusively against public displays (including unsolicited mailing) and against the present

tation of pornography to persons under the age of sixteen. The memorandum further recommended that all national guidelines on pornography be repealed and that future policies on prosecution be developed locally in close consultation with the mayors. Although no formal announcement was made to that effect, the above recommendations have all been implemented. Presently, there are no formal national guidelines on the investigation and prosecution of pornography.

The number of convictions for pornography offences has declined rapidly since 1960. In 1980, only two persons were convicted of committing offences under Section 240 of the Penal Code and there were no individuals convicted under Section 451 (distribution of pornography to a minor). Locally, some measures of control are still exercised on the performance of live shows and, or, on the exterior display of sex articles or sex magazines by specialized shops. In most parts of the country however, there are no formal controls being exercised on sexually arousing performances, films presented to adults, and on the dissemination or public display of explicit sexual materials.

2.3 Public Attitudes Toward Pornography

2.3.1 Public Opinion Research

A 1970 Gallup poll showed that 60% of a national sample was of the opinion that the purveyance of pornography to adults should not be prohibited by the law. In 1972, a more extensive national survey was conducted on the same subject.⁶ In this study, 89% of the respondents said that adults should be allowed to

⁶ Revu. Porno News, stigl. 24-2-1984.

read or see any sexual material. In response to another question, 71% percent claimed that they did not consider the present availability of pornography to be a serious problem. A majority of the people sampled however, stated that they would personally be annoyed if confronted with sexually explicit material in the following ways: unsolicited mailing of sex magazines (71%), exterior display of sex magazines in shop windows (75%), or unexpected presentation of sexual acts on television (54%). On the other hand, a clear majority stated that they would not be annoyed by various other, less sudden, confrontations with pornography (e.g., magazines displayed in a bookshop, sexual acts in a film presented in a cinema, etc.). These results were interpreted by the researcher as evidence for a general climate of tolerance toward nonobtrusive forms of distributing pornography.

In 1981, The Netherlands Foundation for Statistical Research conducted a study on twenty different social problems in Holland. The study found that the availability of pornography was rated as the least pressing social problem. Three percent of the people surveyed considered pornography to be a topic of interest for the population at large. Only one percent of the sample indicated any emotional involvement with pornography as a social problem.

T. Schalken, Pornography and Criminal Law, Ph.D., Leiden University (in Dutch, with an English summary), Gouda Quint, Arnhem, 1972.

2.3.2 The 1979 Bill on Pornography and the Feminist Critique

In most respects, the 1979 Bill on pornography would result in the public prosecutors continuing their present tolerant policies. The new Bill however, would probably induce the prosecutors to move towards a more active enforcement policy against anyone who displays pornographic material externally (e.g., window displays) in a manner that offends the public. In this case, the law would somewhat redress the previous trend towards de facto legalization of pornography.

Since the mid seventies, the free availability of pornography in The Netherlands has not encountered any discernible opposition from the public at large. Recently however, the 1979 Bill on pornography came under attack from several authors and groups. 8 According to some authors, pornography is degrading to women and therefore, should be outlawed. Other critics of the Bill assert that violent forms of pornography and pornography involving children are criminogenic factors.

In 1982, the Council for the Emancipation of Women, an official government body, issued a negative opinion on the Bill. The Council urged the State Government to commission research into the possible causal relationships between certain forms of pornography and deviant sexual behavior and into the extent to which coercion is exerted upon models participating in the production of pornography.

Multi-Dimensional Indicators of Involvement with Social Problems, Report II, 1981, The Hague (in Dutch).

In 1983, the Minister of Justice and the Minister for the Emancipation of Women, issued a joint report on the future policies concerning sexual offences against women and girls. The report announced that the government will commission a research project on the use of coercion upon pornography models. The government will sponsor groups or institutions which will try to develop a view of female sexuality acceptable to women. The report further acknowledges that certain forms of pornography give a dehumanized image of female sexuality. The discriminatory character of such materials could possibly justify the prohibition of its production and dissemination. The government report however, questions whether such a prohibition could be part of the pending Bill. It appears that no final decision has yet been made to this respect.

3. Prostitution

3.1 National Legislation and Jurisprudence

Since 1911, The Netherlands Penal Code contains
Sections which penalize the procuring of minors
(Section 250), habitual or occupational procuration
(Section 250 bis) and trafficking of women or minors of
both sexes (Section 250 ter). 10 The present Section
250 on the habitual procuration of adults however, is
likely to be repealed. (The reason for this will be

Women Against Pornography, issued by Women Against Sexual Violence, Amsterdam, Postbos 150241, Amsterdam (in Dutch).

Preliminary report on the Policies to Control Sexual Violence Against Women and Girls, Minister for the Emancipation of Women and Minister of Justice, October, 1983 (in Dutch).

discussed in the last paragraph.) In addition, the Penal Code provides a Section on "living off the avails" (Section 423.2). Although these Sections were modified several times, they are retained in the present Penal Code.

In 1983, the Minister of Justice drafted a Bill seeking to repeal the present section "living off the avails" by a new, more limited prohibition of coercive forms of pimping. The proposed Section on "living off the avails" reads:

Anyone is liable to imprisonment not exceeding eighteen months or a fine not exceeding twenty-five thousand guilders (approx. \$12,000) who forces another person by force or any other act, by the threat of force or the threat of any act, to share the profits of her prostitution with him.

Presently, the Bill is being reviewed by the High Council of the State.

3.2 Law Enforcement and Social Policies

3.2.1 The Prevalence of Prostitution

According to authoritative estimates, there are approximately 10,000 female prostitutes, of which 1,000 are under the age of eighteen. There are no national estimates on the number of male prostitutes. However, in Amsterdam the number of male prostitutes has recently been estimated at 2,000.11

A minor is legally defined as a person under the age of 21. Procuration is defined as wilfully encouraging someone's immoral mode of life (prostitution).

The 1977 survey of Dutch Mayors revealed that more than 200 cities have some form of prostitution being practiced at approximately 2,500 addresses. Of these 2,500 addresses, approximately 1,000 addresses have prostitutes which solicit their customers from behind windows (so called window prostitution), while at another 1,000 addresses, traditional bawdy houses or purported sex clubs are being operated. According to most of the Mayors, the total size of the sex industry has remained fairly constant over the past two years. Authoritative sources have further noted that the traditional figure of the pimps, who have had a personal relationship with one or more prostitutes, has recently become less prevalent. Presently, there is an increasing number of prostitutes who are employed by the owners of sex clubs. Another significant trend is the increasing number of drug addicted prostitutes who practice the more dangerous forms of prostitution, such as street or highway solicitation.

3.2.2 Municipal Police Regulations

Commercial sex businesses, such as bawdy houses, sex clubs or "fronts" (massage parlours and saunas) are subject to several local planning regulations. Some cities have introduced special licensing schemes and regulations for the operation of massage parlours, saunas, and places where any form of entertainment is provided. These general regulations can also be applied to commercial sex businesses.

Special licences must be obtained from the Mayor for the retail of alcoholic beverages. Recently, the High Court has decided that all commercial sex businesses, serving alcoholic beverages on premises, are subject to the regulations under the Liquor and the Hotel and Catering Industry Act.

In addition, police regulations in approximately sixty percent of all cities prohibit owners and tenants of premises (e.g., houses, buildings, cars, boats) to allow their places to be used for the purpose of prostitution. The High Court has upheld the legitimacy of these bylaws on the grounds that they serve the purpose of protecting the public order and, therefore, have a different purpose than Section 250 of the Penal Code. The regulations usually provide for a system of administrative measures which facilitate their enforcement. The Mayor, for example, is authorized to formally close down the violating business or club and to prohibit all nonoccupants to enter these premises.

Police regulations of most larger cities also contain a Section which prohibits various forms of soliciting for the purpose of prostitution (e.g., street soliciting or soliciting from behind windows). The prohibitions are usually worded in a manner than known prostitutes can be arrested for loitering, standing, or sitting in or at a public place. In some cities, the soliciting by customers has recently been penalized. "Police regulations in The Hague, Utrecht, Arnhem, and other cities list certain streets which are exempted from the prohibition of soliciting. The

Amsterdam police regulations authorize the Mayor to issue a list of the streets where the regulations on soliciting do not apply.

Finally, some cities have passed police regulations authorizing the Mayor to notify individual persons (common prostitutes) that for a period not exceeding three months they are not allowed to be present in certain areas of the city during certain hours unless they are using public transportation.

The High Court has upheld the constitutionality of the regulations on soliciting.

3.2.3 Law Enforcement and Social Policies

In 1976, the Assembly of Prosecutors General issued national guidelines for the investigation and prosecution of prostitution. According to these prosecution quidelines, Section 423.2, "living off the avails," is no longer to be actively enforced, as prostitutes are unwilling to testify; an active enforcement policy is to be taken against the "procuring of minors"; and a restraint and selective law enforcement policy is to be used against the operators of bawdy houses and sex clubs. The latter prosecutions under Section 250 bis are to be initiated only when the activities occur outside the traditional designated areas for prostitution; where the public is offended; minors are unduly exposed to the manifestation of prostitution; or where prostitution causes a public nuisance. These guidelines however, have been repealed and no other guidelines exist.

In the same year, the Police Committee of the Association of Dutch Cities issued a report on the municipal policies on prostitution. 12 The report presented a detailed description of the current law enforcement and administrative policies in the larger towns. The report claimed that these policies impose a form of selective control over the manifestations of prostitution. The administrative and enforcement policies are typically aimed at a stringent enforcement of all police regulations concerning bawdy houses and street or window soliciting in all areas except those zoned specifically for prostitution. In most towns, police regulations provide the legal framework for these policies by explicitly exempting certain areas from the prohibition of soliciting. The policies of selective control are supported by means of informal police directives. In Amsterdam for example, the police do not arrest the owners or managers of existing bawdy houses in the inner city if they comply with the following rules: no prostitutes below the age of 21 or with a foreign nationality; no involvement in any other criminal activities; no blatant forms of soliciting; and no attempts at expansion.

The policy of selective control is often further supported by means of administrative measures. In some towns, the owners of bawdy houses or sex clubs who comply with the rules were issued formal licenses for the retail of liquor and, or, the presentation of films or other forms of entertainment. In The Hague for

Scholtes, J.I.T., Prostitution, Data and Ideas, Mr. A. de Graaf Foundation (foundation seeking the social integration of prostitutes), Amsterdam, 1980 (in Dutch).

example, the city has recently decided to close off three "prostitute streets" to motorized traffic and to improve the condition of both the streets and the houses. The owner of the sex clubs have agreed to collaborate with the city in the latter improvements. The provision of the Penal Code prohibiting procuring (Section 250, bis) prevents the Mayors from licensing bawdy houses in an explicit manner. The report urged the central government to repeal this Section in order to give the cities more scope for the implementation of a policy of selective control.

In 1977, the Advisory Committee on Legislation on Sexual Crimes, issued a report on prostitution which generally endorsed the ideas expressed in the report of the cities. ¹³ The committee however, does not adopt the recommendation to repeal Section 250 (bis).

In 1979, a working group of prosecutors drafted a memorandum on the law enforcement policy for prostitution, which supported most of the views expressed in the two reports previously discussed. The group recommended that the 1976 guidelines should be repealed and future policies be determined at a local level after the Mayor was consulted, and the owners of commercial sex businesses were to be arrested preferably for violating local police regulations. The group however, recommended that Section 250 (bis) in

Municipal Policies on Prostitution. Association of Dutch Cities, The Hague, 1976.

the Penal Code should be retained on the grounds that the Section may be needed as a last resort in the future. The working group were of the opinion that the intention of this Section (250) does not prevent the adoption of local regulatory schemes to control prostitution. As a result of these recommendations, the 1976 national guidelines for the investigation and prosecution of prostitution were repealed.

In 1980, twenty persons were arrested for procuring minors of which eleven have been convicted. Two persons were arrested for Section 250 (bis)(procuring), of which neither was convicted. According to a memorandum on the 1979 working group of prosecutors, a small number of persons are annually prosecuted and convicted for violating local police regulations on prostitution.

Regarding medical and health regulations, the local governments of some cities provide a special facilities clinic for the prostitute but, the prostitutes are under no obligation to get a physical examination. It is also worth mentioning that research in Holland has indicated that venereal diseases among prostitutes are less prevalent than among the general population. 14

3.3 Public Opinion and Current Policy Trends

The subject of prostitution has never been included in an opinion poll in The Netherlands. It is generally assumed however, that the public at large is not strongly opposed to the current permissive policies of selective control.

Third Interim Report of the Advisory Committee on the legislation on sexual crimes, Prostitution, The Hague, 1977 (in Dutch).

The 1977 survey among the Mayors from all Dutch cities, found that some form of prostitution existed in 202 of these cities. Of these 202 cities, 72 of the Mayors claimed that prostitution has generated some kinds of problems within the city. The most frequently cited problems appeared to be complaints of local residents about unwanted exposure to prostitution (42 cities), extensive noise (32 cities), unfair competition with normal pubs (29 cities), and adverse effects upon real estate prices (27 cities). The Mayors of 13 cities reported that no satisfactory solutions have been found for these problems. An analysis of these findings indicates that street and window prostitution cause more problems than bawdy houses and sex clubs.

In some towns, local authorities appear to be successful in restricting most forms of prostitution to certain areas without generating too much opposition from the residents of these areas. 16 In Utrecht, the area concerned is scarcely populated; in The Hague, the city has offered financial support to those residents who decided to move to another area; and in Arnhem, the prostitution business is concentrated in a traditional red light district. In response to strong opposition from residents, the Mayor of Rotterdam has closed down all commercial sex businesses in the traditional red light district. The city however, has not succeeded

Scholtes, J.T.I. Prostitution, Data and Ideas.
Schapenk, A.G.W., Prostitution Penal Law, Local
Administration, in: Anti-revolutionaire staatskunde,
Aug. 1977 (in Dutch).

in assigning a new "concentration area" for prostitution. The decision by the city of Rotterdam to license the exploitation of two ships as brothels was reversed by the High Council of State (Federal Court) on the grounds that the city would contravene Section 250 (bis) of the Penal Code. This last decision has caused the Mayors of Rotterdam and Amsterdam, several other public figures, and concerned groups to urge the central government to repeal Section 250 (bis).17

Recently, the feminist movement has expressed views that prostitution is as a symptom of a sexist society. Given the present situation however, the feminists argued that the prevention of exploitative and coercive forms of prostitution should be given high priority. Prostitutes should also be given the same legal and social protection as other workers. For this reason, some feminist authors support commercial sex businesses which are operated by a collective of prostitutes. In order to facilitate the operation of such businessess, these authors also urge the government to repeal Section 250 (bis).18,19,20 In March, 1984, the Minister of Justice publicly announced his intention to repeal Section 250 (bis).

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CHAPTER IV

EXPERIENCES WITH PORNOGRAPHY AND PROSTITUTION IN THE FEDERAL REPUBLIC OF GERMANY

1. Introductory Remarks

The Federal Republic of Germany is a federation of ten states with approximately 60 million inhabitants.

The legislative power is exercised primarily by the Bundesrat (federal Parliament). The constitution embodies the Bundesrat with exclusive legislative power in certain fields. In all other fields, including criminal law, the states can supplement federal laws with their own laws but the latter can never suspend federal laws ("federal law over rules state law"). Both federal and state laws can be annuled for contravening the constitution by the constitutional Court (Bundesverfassungsgericht). The Supreme Court is the highest federal court deciding upon the interpretations of legal items. The highest court for administrative law is the Federal Court of Administrative Law.

Criminal proceedings may only be instituted by the public prosecutors, who are career lawyers. German law recognizes the principle of legality, which means that the public prosecutor is bound to prosecute if an offence is made known to him.

2. Pornography

2.1 Legislation

The original Penal Code, (enacted 1871) had a section prohibiting the distribution, recommendation, advertisement, production, storage, exportation of "indecent texts", and the displaying and advertising of sex articles (articles for indecent purposes). In

1900, this section was extended to prohibit the offering of indecent publications to youngsters.

In the sixties, several proposals were put forward for a new law on pornography and in 1970, the socialist government presented a Bill to Parliament seeking to restrict the scope of the prohibition to the distribution of hard core (sadistic and pedophile) pornography, the offering of pornographic materials to youngsters and unsolicited mailings. This Bill was criticized, particularly by representatives from the Catholic Church. In order to accommodate the critics, Parliament made several amendments to the Bill. The amendments enlarged the scope of the prohibition by penalizing the presentation of pornographic films in cinemas and on television, and the display of pornography in shop windows, so forth; by expanding the section on the distribution of hard core pornography to include the portrayal of sex with animals; and byintroducing a special section prohibiting the production and distribution of violent pornography as an offence against public order.

In a memorandum explaining the Bill, the government and several German penal experts, asserted that penal law should not seek to uphold certain standards of decency as a goal in itself. Sexual manifestations should only be penalized to the extent that they demonstrably damage the interests of individuals or the community. The penal experts who were consulted by a special committee however, did not testify to the harmfulness of pornography for adults. For this reason, the government gave priority to the right of individuals to determine their own way of life and

therefore, to liberalize most nonobtrusive forms of pornography. This liberalization would admittedly make it difficult to prevent the distribution of pornography amongst youngsters. The partial liberalization of pornography however, would enable law enforcement authorities to focus their efforts upon the distribution of pornography among the young. The Bill was enacted by Parliament in 1973.

In the present Penal Code, a distinction is made between the laws on common pornography and hard core pornography. Section 184(1) of the Penal Code punishes anyone who offers pornographic materials to persons under the age of eighteen; has an exterior display of such materials, and their unsolicited mailing; presents pornographic films in public places where the charge of admission is mainly meant for the presentation of a film; and prohibits the export of pornography to other countries. Section 184(2) prohibits the presentation of pornography on television and the radio. Section 184(3) on hard core pornography, penalizes the production and all forms of distribution of pornographic materials portraying the use of violence, the sexual abuse of children, or sexual acts of humans with animals. The maximum penalty for all pornography offences is one year imprisonment.

Part XIII, Section 131 of the Penal Code, which deals with offences against public order, prohibits the production and distribution of hate literature and violent pornography (not necessarily related to sexual acts). This section makes anyone who produces, distributes, displays, advertises, imports or distributes to minors "materials which depict acts of violence against human persons in a cruel or otherwise inhumane way and

thereby, glorify or treat as harmless such acts or which incite to racism" is liable to imprisonment not exceeding one year. This separate prohibition of "violent pornography" is unique in Europe and possibly throughout the world.

The Law on the Protection of the Young in Public Places contains a Section prohibiting the public presentation of films likely to be detrimental to the development of youth towards physical, moral or social fitness. The highest state authorities for the protection of youth are entitled to license films and to certify them as fit for the age groups under 6, 12, 16 or 18. Anyone who contravenes this prohibition or who by so doing thoughtlessly endangers a child or youngster in his development, is liable to a fine.

The Law of 1965, against the dissemination of materials which are harmful for the young (the so called Filth and Smut Statute) embodies the Federal Board of Censorship with the authority to put publications or other materials which are deemed harmful for youth on a special list. All materials listed may not be made available to persons under the age of eighteen. Written, pictorial or audio visual materials are deemed harmful for the young if they endanger their moral development, especially by being indecent, coarsening, or by inciting to acts of violence, crime, racism or glorifying war. Materials not listed, but covered by the definitions of pornography in Sections 131 and 184 of the Penal Code, or which seriously endanger the moral development of the young, can not be distributed among the youth. All these contraventions

are punishable with imprisonment of up to one year.

A special law prohibits grossly offensive advertisement for anticonceptives, stimulantia, and so forth. Finally, the Law on Commercial Activities (Gewerbe-ordnung) makes it obligatory for the managers of sex clubs which perform live shows, peep shows, etc., to apply for a license with the municipal authorities. According to this law, such licenses are not to be issued if the performances concerned will contravene positive law or morality.

2.2 Jurisprudence

The concept of pornography in Section 184 of the Penal Code was interpreted by the courts in the following way. A depiction is considered pornographic if it thrusts into the forefront sexual acts in a grossly obtrusive way and with the exclusion of all other aspects of human relations, and if its general purport is exclusively or predominantly aimed at a lustful interest in sexuality. In determining the pornographic character of any material, the courts do not take into account the subjective meaning given by the author. The courts have unanimously held that the mere portrayal of a naked female or male body, sex organs, or sexual acts, including sexual intercourse, is not by itself pornographic. The mere depiction of sexual acts by a child or of children in obscene postures is not considered to be hard core pornography as defined in Section 184(3) of the Penal Code.

The higher courts have delivered several decisions on the meaning and constitutionality of various specific elements of Section 184 of the Penal Code. The

Court of Constitutional Law (Bundesverfassungsgericht) has especially been asked to comment upon the constitutionality of the subsection prohibiting the presentation of pornographic films in ordinary public cinemas (e.g., cinemas which collect an admittance fee predominantly meant for the presentation of a film). According to a memorandum explaining the purpose of the Bill, this subsection wants to prevent the presentation of pornographic films to youngsters. The legitimacy of this prohibition however, was questioned with the argument that the licensing scheme of the Law on the Protection of the Young already sufficiently prevents the presentation of pornographic films to youngsters. The Court of Constitutional Law decided that the licensing system does not provide a sufficient amount of protection for youth, as ordinary cinemas can never prevent the incidental admittance of a youngster. Therefore, Section 184 regulations on films are not superfluous. Nevertheless, the courts found it extremely difficult to decide upon whether or not an admittance fee was collected "predominantly" for the presentation of a film. Presently, various courts apply quite different standards in determining this question. According to the Supreme Court (Bundesgerichtshof), this question must eventually be resolved by the legislator.

The Section on violent pornography (Section 131, P.C.) has also created severe of interpretation problems. The courts do not readily assume that a depiction of violent acts, however cruel or inhumane, glorifies such acts or portrays them as harmless. Consequently, the scope of the prohibition is very limited.

In a 1981 Federal Court of Administrative Law
(Bundesverwaltungsgericht) claimed that the licensing
by some municipal authorities of peep shows, should not
be licensed as they are in contravention of morality.
The Court was of the opinion that peep shows are
injurious to human dignity, which according to the
constitution is to be upheld against the wishes of the
persons concerned. The Court decided that the mere
exposition of a naked female body is not sufficient to
injure human dignity and that other forms of live shows
can still be licensed. The Court noted, that given
their special characteristics (their automated
procedures, the dehumanizing isolation of female
bodies, and the opportunities given for masturbation)
peep shows are to be considered particularly immoral.

It is still unclear what impact this verdict by the Court will have on the licensing of peep shows.

2.3 Law Enforcement

There are no special guidelines for the prosecution of pornography cases. In Hamburg, prosecutors may not initiate proceedings under Section 184 of the Penal Code, or any of the Sections in the Protection of the Young Law, against a first offender. Recidivists are usually offered the opportunity to pay a fine in order to avoid a conviction by the courts.

The Hamburg police force has a special unit for the protection of the young. This unit periodically inspects shops that sell forbidden pornographic material to minors. The police unit however, found it practically impossible to control the admittance

policies for cinemas, peep shows, etc., with regard to youngsters.

Since 1982, the Federal Republic has experienced a boom in the sale and renting of video films portraying acts of extreme violence. Several video shops that rent video films were known to contravene the Protection of the Young Law. Presently, the prosecution of these cases is one of the priorities for the public prosecutors.

An overview of the number of convictions and of the number of cases dismissed by the public prosecutors concerning Section 184 of the Penal Code is presented in Table 4.

TABLE 4

Numbers of Convictions and Cases Dismissed by the Public Prosecutors for Contraventions of the Sections on Pornography in the Penal Code for the Federal Republic of Germany between 1960 through 1982

Year	Convictions	Cases Dismissed
1960	444	unknown
1970	268	91
1971	388	261
1972	510	233
1973	488	303
1974	380	382
1975	298	226
1976	217	190
1977	217	197
1978	163	144
1979	163	108
1980	150	143
1981	120	93
1982	128	103

Table 4 shows that following the enactment of the new law in November, 1973, there is a decline in the number of convictions especially after 1974.

The relatively high number of dismissals seems to bear witness to the difficulty of submitting sufficient evidence for a conviction under Section 184. The usual penalty for these offences is a fine. In 1982 however, 11 persons were sentenced to imprisonment. No statistics were available on the number of convictions for violent pornography. It is generally known however, that very few such convictions have occurred. 2

2.4 Public Opinion and Current Policy Trends

2.4.1 Public Opinion

No relevant surveys on the attitudes towards pornography have been conducted in Germany. Presently, it appears that the public is not interested in the subject of pornography. Groups who oppose pornographic films, especially taking a view to protect the young, seem to agree that the government should take action in one form or the other against the spread of these films.

On the other hand, the negative decision by the Court for Administrative Law on the licensing of peep shows was severely criticized by penal lawyers and sexologists. The Director of the Department for Sexual Studies at the University Hospital in Hamburg, for example, has characterized the argumentation behind the decision as "backward" and "pathetic."

E. Uschuld, Erfahrungen mit par. 131 StGB in der strafrechtlichen Praxis, in: Recht der Jugent und des

Bildungswesen, 25 vol. nr. 4, July/Aug. 1977.

Cases can be dismised by the prosecutor when he considers the evidence to be weak or when the defendant has agreed to pay a fine (relatively small) to the prosecutor.

The feminist movement in West Germany appears to be divided on the question of pornographic policies. groups demand a total ban of all materials including advertisements that are sexist in character, similar to the antidiscrimination laws in other countries. The same groups also demand a total prohibition of distributing of violent video films because the victims in these films are predominantly of the female sex. Other feminist groups have ambivalent opinions on the use of more repressive measures. They fear that new prohibitions might not be directed against sexist pornography but against all forms of deviant sexual behaviour, including lesbianism. These groups also are concerned with the emergence of a new wave of puritanism that may negatively effect the emancipation of women, which never was one of the movement's objectives. The latter groups are, for example, also strongly opposed to the recent prohibition of peep shows because the women involved will be pushed into prostitution by this new repressive policy.

According to recent estimates, 5,000 video films of a horror and violent nature are for sale in the Federal Republic.³ The sales of such video films have given cause for concern among a large part of the public.

Since the enactment of the new law on pornography in 1973, the number of rapes registered by the police has declined. This does not confirm nor infirm

Bundestag-Drucksache 10/806, p. 37.

however, the hypothesis of some that the free availability of pornography will generate sexual crimes. Nevertheless, some people assume that the present day video film pornography will indeed generate sexual crimes.

2.4.2 Current Trends in Policy

In December 1983, the coalition government of Christian Democrats and Liberals published a draft document to amend the Law on the Protection of the Young in Public Places and other existing laws (Bundestag-Drucksache 10/722). The draft proposed the following legal provisions against the distribution of brutal and pornographic video films:

- 1. The dissemination of video cassettes among youngsters will be made subject to the same licensing regulations as ordinary films. This means that video cassettes may only be shown to youngsters if they have been licensed for that purpose by the state authority for the protection of the young;
- 2. Materials which are harmful for the young may not be distributed among them, regardless of whether they have already been indexed as such by the authorities or not. (This proposal is an amendment to the Law Against the Dissemination of Materials Which Are Harmful for the Young.) It will make the time consuming screening procedures established by this Law less important. The prohibition to distribute such materials will include the renting of video cassettes;
- 3. Finally, it is the government's intention to modify the existing section on violent pornography (Section 131, P.C.) in such a way that the manufacturers and purveyers of horror, or fighting films, which are socially harmful in a general sense, can be prosecuted more effectively. The production of all materials depicting acts of violence in a cruel or otherwise inhumane way will be prohibited.

This proposal means that the present requirements for a conviction, that such materials glorify violence or suggest its harmlessness, will be dropped.

It is possible that the above-mentioned proposals will be enacted in the course of 1984.

3. Prostitution

3.1 Legislation and Jurisprudence

3.1.1 Legislation at the Federal Level

During the 19th century, there werestringent licensing regulations. This system however, was abolished in 1927 and a new law introduced prohibiting certain activities associated with prostitution (e.g., habitual or commercial procuration and living off the avails). During the reign of the national socialist party (1933-1945), the legal situation remained basically unchanged. The prostitutes themselves however, were subject to extremely repressive measures. Many of the prostitutes were detained under the laws on the Sterilization of Habitual Offenders and The Socially Unfit laws of 1933. From 1939, persons with venereal diseases amongst whom many were prostitutes, were detained in special institutions and later many of them were gassed by way of "euthanasia."

In 1970, a Bill was presented to Parliament for a new Penal Code containing revisions of prohibitions on prostitution. The government asserted in a memorandum that the moral harm done by the encouragement of extramarital liaisons did not by itself justify penal prohibitions. Procuration should only be prohibited with the aims of protecting the young and protecting

Concerning the latter objective, the government observed that few persons enter the profession of prostitution voluntarily and that all prostitutes run a great risk of being made dependent upon others or being socially harmed in other ways. The 1970 Bill which was finally enacted in November, 1973, includes several sections on procuration. Section 180 prohibits the procuring of minors under 18 years ("putting such persons in a position where they can prostitute themselves for personal gain or assisting them therein by means of mediation"). In addition, Section 180(a)(4) makes anyone liable to imprisonment, who leads someone under the age of 21 into prostitution or urges such a person to start or continue prostitution.

According to Section 180(a), a person who operates an establishment in which others prostitute themselves, is liable to imprisonment for "procuring":

if the prostitutes are kept in a position of economical or personal dependency; if the prostitution is furthered by other means than by the simple provision of rooms and the usual accompanying services; if the prostitutes who are provided with lodgings are urged to prostitute themselves or are exploited financially for that purpose; if prostitutes are actively recruited; and, if prostitutes under the age of eighteen are provided with facilities of any kind.

Section 181(a) makes anyone liable to imprisonment for "exploitative pimping" who maintains a personal relationship with a prostitute and (a) exploits her; (b) supervises her work for his own financial gain; (c) takes measures which prevent her from giving up her profession; and (d) facilitates her work in a business like manner by bringing her into contact with clients.

Section 181 makes anyone liable to imprisonment for "trafficking in human persons," who induces someone to be a prostitute by using violence, by threatening her or by applying a ruse; or, who recruits, or abducts someone, with the aim of compelling her to perform sexual acts by exploiting her vulnerability in a foreign country.

Finally, Sections 184(a) and 184(b) of the Penal Code, are directed against certain activities performed by prostitutes. Section 184(a) penalizes repeated contraventions of local bylaws prohibiting certain forms of solicitation (to be discussed below), while Section 184(b) prohibits prostitutes to solicit clients in the vicinity of schools or other places frequented by youngsters.

Each state within the Federal Republic of Germany is explicitly authorized by law within the Federal Penal Code of 1973, to pass bylaws prohibiting prostitution in certain parts of the towns and, or, during certain hours with the aims of protecting the young or protecting public decency. These bylaws however, may not ban prostitution altogether in towns with a population of more than 50,000. Towns must have at least one area exempted from this prohibition. All states have enacted such bylaws except for West Berlin, which repealed its prohibitions of soliciting in 1970.

The Law on the Repression of Venereal Diseases of 1954 authorizes health institutions in the states to demand medical examinations for anyone who is seriously suspected to have a venereal disease. According to this law, the states' health institutions can demand that prostitutes must register themselves and appear for regular medical checkups. All states have enacted state laws governing the details of these obligatory medical examinations.

Finally, any foreigner who acts as a professional prostitute can be deported under Section 10 of the Law on Aliens.

3.1.2 Legislation in the State of Hamburg

All states, except West Berlin, have passed bylaws designed to control street solicitation. In this report, the regulations of the State of Hamburg will be discussed by way of example. It must be pointed out however, that the State of Hamburg, with its international harbour is not typical of the other German states.

In 1980, the State of Hamburg passed a law prohibiting street or window solicitation in those parts of the city of Hamburg which have traditionally attracted prostitution. In these parts of the city, public solicitation is permitted between the hours of 8 p.m. and 6 a.m. On one particular street however, the Herbertstrasse in the district of St. Pauls, solicitation is still permitted during the whole day. The entrances to this last street are blocked and youngsters and women are not allowed. The prohibition is meant to diminish the nuisances caused by street

solicitation within the inner city of Hamburg. In other cities (e.g., München), the prohibitions are aimed at totally banning prostitution from the inner city.

In the State of Hamburg, all prostitutes are legally required to register themselves at the bureau of the central health inspector and to visit this bureau for a weekly medical examination. The enforcement of this regulation is the sole responsibility of the health inspector.

3.1.3 Jurisprudence

Concerning the new sections on "procuring" and "pimping" the courts have made a series of important decisions on the meaning of certain terms. The city of Hamburg has two "eros centres" (e.g., blocks of apartments with approximately 150 rooms that are rented to prostitutes for the reception of customers). The owners and managers of these "prostitution centres" cannot be convicted under Section 180(a) of the Penal Code (procuring), as long as they only provide basic facilities to prostitutes.

The operators of "call girl" businesses contravene the prohibition of procuring, because they usually recruit prostitutes. When customers are brought into contact with a particular prostitute by means of a personal communication with the operator of such business, the latter can also be convicted for pimping. The regular reception of large sums of money from a prostitute does not by itself constitute the crime of "exploitative pimping" (Section 181(a)). To be convicted under this Section, a person must have

grossly exploited the labour of a prostitute or exerted some form of undue influence upon her (e.g., by making use of a position of psychological dominance).

The simple provision of physical protection during work does not constitute the crime of "supervisory pimping" (Section 181(a)). To be convicted under this Section for instance, a person for instance, must control the payments to a prostitute.

A person cannot be convicted for trafficking in human persons (Section 181) if the woman involved was informed in advance of the purpose of her trip abroad. In such circumstances, the organizer of the trip cannot be said to have exploited her vulnerable position in a foreign country.

3.2 Law Enforcement and Social Policies

3.2.1 The Size and Nature of Prostitution

In 1973, the number of prostitutes per 1 million inhabitants was estimated at 1,500 in the large urban areas of West Germany. 4 On the basis of this rate, the total number of prostitutes in West Germany can be estimated at approximately 30,000.

In Hamburg, 1,688 female prostitutes were registered with the health inspector in 1979. Every month, approximately 70 new prostitutes are registered. There were no clear trends in the number of prostitutes since 1970. According to the Hamburg police, nonregistered prostitutes out-number the registered ones. In a recent monograph on prostitution in Hamburg, the total number of prostitutes was estimated to be at its lowest rate, with 4,500

Kerner, H.J., Professionelles und organisiertes Verbrechen, Wiesbaden, 1973.

(Kahmann, Lanzerath, 1983). According to the Hamburg police, the number of prostitutes has increased since the mid seventies.

In Hamburg, like elsewhere in Germany, prostitution takes four main forms: street solicitation and solicitation in bars, etc.; prostitution in so called eros centres; special prostitution streets (window solicitation); and prostitution in private sex clubs and fronts (including call girls). In Hamburg, the police have identified approximately 100 to 120 sex clubs and fronts. The daily rent of the rooms is approximately 65 DM (\$30 Cda). Consequently, only prostitutes who have many customers can afford to work in these centres. Their average daily earnings are approximately \$200 Cda.

Since the mid seventies, the number of prostitutes offering their services in small ads in local papers is on the increase. They receive their customers in their own flats or meet them in hotels. The number of sex clubs outside the traditional red light districts has also increased. As a result of these trends, a second prostitution "market" has developed outside the traditional districts within the inner city. According to the police, the number of very young prostitutes working in private clubs, are increased. Most prostitutes in Hamburg, especially the younger ones, maintain a relationship with a pimp.

3.2.2 Law Enforcement

There are no guidelines or directives for the prosecutors or the police on prostitution in Hamburg.

The municipal police keeps under surveillance the traditional red light districts including the eros centres. The new regulations prohibiting street solicitation in certain parts of the city during day time are actively enforced by the police. Since the local courts of Hamburg demand clear evidence that a prostitute has effectively contacted a customer, the police have occasionally made use of decoys (police officers presenting themselves as potential customers). In spite of these efforts, the goal of containing street solicitation within certain areas has not yet been achieved.

According to the police, the investigation of cases of (exploitative) procuring or pimping is extremely difficult because the prostitutes are seldom willing to testify before a judge. If a prostitute files a serious complaint, the defendant is usually arrested at once and brought before the investigative judge. Quite often however, such cases are eventually dismissed due to the lack of evidence. It is expected that newly established units of the police specializing in organized crime and employing undercover agents, will be capable of investigating cases of exploitative pimping and trafficking more effectively.

The following table presents the number of convictions under sections 180, 180(a), 181, 181(a) and 184(b) of the Penal Code since 1975.

TABLE 5

Convictions Under the Section 180 (Procuring of Minors), Section 180(a) (Illegal Procuring), Section 181 (Trafficking in Women), Section 181(a) (Exploitative Pimping), Section 184(a) (Illegal Prostitution), and Section 184(b) (Prostitution Endangering the Young), of the Penal Code for the Federal Republic of Germany for the Years 1975 through 1982

	180	Se 180(a)	ection of 181	the Penal 181(a)	Code 184(a)	184(b)
1975	95	42	16	290	579	0
1976	61	71	24	184	680	2
1977	50	96	14	160	583	7
1978	39	82	25	163	638	2
1979	43	70	17	126	587	2
1980	29	74	28	114	481	2
1981	35	89	27	103	306	2
1982	32	95	18	104	343	1

Source: Statistishces Bundesamt

In the cases of Section 180 (procuring of minors) and Section 180(a) (illegal procuring), the usual penalty given is a fine or a suspended sentence of imprisonment. Under Section 184(a) (illegal prostitution), the usual sentence for conviction is a fine. Defendants under Section 181 (trafficking in women) and Section 181(a) (exploitative pimping) however, are usually sentenced to a term of imprisonment (for 181(a) the average term is approximately 1 year).

3.3 Public Opinion and Current Policy Trends

There have not been any studies on the public's view on prostitution. It can be said however, that the women's movement in West Germany generally rejects all repressive measures directed against prostitutes.

Although prostitution is condemned as an expression of the repression of women in society, all repressive forms of controlling prostitution are rejected for being counterproductive. By such policies, the goal of repressing prostitution is not achieved at all while the prostitutes themselves are greatly victimized by it. For this reason, the women's movement in West Germany urges for improvements in the social position of prostitutes and the repeal of all existing prohibitions with discriminatory features.

The Bureau for the Emancipation of Women, 5 an official body established by the senate of the State of Hamburg, advocates the repeal of the existing bylaws prohibiting street solicitation in certain parts of the city. These prohibitions are a burden for the prostitutes and have not achieved their aims. The Bureau is also critical of policies aimed at containing prostitution within a few narrow areas in the city. This policy makes the prostitutes more dependent upon the landlords and gives the pimps optimal conditions for controlling "their" prostitutes. Finally, the Bureau supports the demand of many prostitutes, for the abolition of the discriminatory regulations on medical examinations. Although no formal statements have been made to that effect, it is to be expected that the system of obligatory registration and weekly visits to the health inspector will indeed be abolished in the near future. The present day availability of effective medicines against most venereal diseases has made the need for such an expensive system less urgent. A federal committee of governmental experts has

⁵ Leitstelle zur Gleichstelling der Frau.

recently drafted a proposal for a new law which would make visits to a special clinic for veneral diseases optional.

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CHAPTER V

EXPERIENCES WITH PORNOGRAPHY AND PROSTITUTION IN DENMARK

1. Introductory Remarks

Denmark is a constitutional monarchy and a unitary state with a population of five million. Legislative power is held by a unicameral Parliament. The judicial system contains approximately eighty-four courts, two high courts and one Supreme Court. The Minister of Justice is responsible for prosecution and is represented by a Director of Public Prosecutors. At the first level, however, the prosecution is presented by lawyers working for the Chiefs of Police. The police lawyers are given general directions from the Director of Public Prosecutions. Danish law adheres to the principle of legality. Deviation from this principle is permitted only within very narrow limits.

2. Pornography

2.1 Legislation and Jurisprudence

From 1939 to 1967, Section 234 of the Danish Criminal Code had the following text:

Subsection 1. Anyone shall be liable to fine, simple detention or, under aggravating circumstances, imprisonment up to six months, who:

- 1. offers or hands over obscene writings,
 pictures or objects to a person under 18
 years of age;
- 2. publishes or distributes, or with such an intention makes or imports obscene writings, pictures or objects;
- 3. arranges public addresses, performances, or exhibitions of an obscene content.

<u>Subsection 2</u>. If the mentioned actions are committed for commercial purpose, fines can only be used as penalty under especially extenuating circumstances.

Subsection 3. Anyone who, for the purpose of gain, publishes or circulates or with such intention makes or imports written material, or pictures which, without being actually obscene, must be assumed to have a purpose commerical speculation in sensuality, shall be punished with a fine or simple detention for any term not exceeding one year.

Section 234, Subsection 3, was not included in the original version introduced in 1930 (proclaimed in 1933) it was inserted in 1939 in an attempt to extend the scope of "obscenity" to correspond with the worldwide puritan movement of the 1930's. However, in practice Subsection 3 was hardly ever used. Over the years convictions according to Section 234, although were few, were mainly concerned with importers and purveyors of foreign pornographic literature. In 1957, an English version of Cleland's Fanny Hill was found to violate the law along with a number of other books, but in 1965, a Danish (unexpurgated) translation of that same book was found not to be in violation by the Supreme Court. This clear indication of a change in the legal view of what was to be considered obscene was the reason for the Minister of Justice directing the Permanent Penal Law Committee to investigate the question of obscenity and make recommendations for a penal law reform.

The Permanent Penal Law Committee (1960), supporting its recommendations upon reports from, among others, educationalists, psychologists, criminologists, and a

report from the Medico-Legal Council¹, proposed a repeal of the ban on obscene writings. It was adopted by the Danish Parliament in 1967 by 159 votes to 13.

From 1967 to 1969, therefore, Section 234 was identical with Subsection 1 of the earlier version, except for the word "writings" which had been deleted. During the ensuing debate in Parliament on this amendment, there was a widespread inclination to extend the repeal to also include obscene pictures, objects, and performances, "if experiences with the present amendment turned out to be as positive as expected." The expected result was mainly a waning of interest in such material when similar interest was no longer spurred by the illegality. By 1969, politicians had become convinced that an absolute effect had in fact occurred (see Kutchinsky, 1973) and without once again asking the Penal Law Committee's advice, the present version of section 234 was adopted in Parliament.

While it was generally agreed that all available evidence pointed in the direction of pornography not being directly harmful to individuals, the following concluding statement of the Medico-Legal Council may be of particular interest:

[&]quot;On the basis of general psychiatric and child psychiatric experience it cannot be assumed that the direction of the sexual bent, the mental development of the personality or the total attitude toward sexual life and sexual-ethical norms can - in adults or in children - be influenced in a harmful direction through the media here discussed (pornogrpahic literature, pictures or films). Whether these media may have a beneficial influence on a group of inhibited and sexually shy neurotic personalities is doubtful, but can hardly be totally excluded. What has been said here, holds true no matter whether the pornographic publications, pictures, etc. describe normal or perverse sexual relations." (Report, 1966, p. 40). review of the Penal Law Committee's Report, see Waaben, 1971.

Section 234 (1969) of the Danish Criminal Code, now reads whoever "sells indecent pictures or objects to a person under 16 years of age" is to be punished by fine. According to this law, it is not punishable, for instance, to show, give, send, or lend such material to persons under 16; the mere attempt to sell pornographic material to underage persons is not punishable². According to this legal practice, the main criterion for prosecution with respect to a picture must contain detailed and strongly offensive depiction of sexual topics (including the sexual parts of a single person) in cases where such an illustration cannot be considered justified by artistic merits or by a scientific or educational purpose (Waaben, 1983, p. 99).

Section 235 (1980) has a special provision concerning pornographic photography depicting children. According to this new section, "any person who for commercial purpose sells or in other ways distributes or with such an intent produces or procures indecent photographs, films or the like of children, is punished by fine." The intention of this provision is to protect children against exploitation by the pornography industry³. While the very taking of pornographic pictures and films of children, has always been punishable according to other sections of the Penal Code (Sections 232 on indecent behaviour or

The term "indecent" (Danish: utugtig) has been established (only) through trials prior to the 1969 amendments. "ObjectsL" refers mainly to obscene sculptures.

³ Since 1971 so-called "child pornography" has appeared on the market.

Sections 222, 223, 224 or 225 on sexual relations with a child under the age of 15 years) several police investigations of child pornography during the 1970's have shown that it is generally not possible to find the original author of the pictures. The new Act therefore, provides an adiitional means to curb the traffic in child pornography.

Non-commercial traffic in child pornography is not punishable, nor is the sale, publication or distribution of non-pornographic texts, drawings, and other depictions of children. "Indecent" has the same definition as mentioned under s. 234 above, which means, for instance, that the sale, publication or distribution of nude pictures of children (the contents of the majority of photographs in child pornography magazines; see Kutchinsky, 1980 and 1983), is not punishable. The definition of "children" however, has become non-distinct resulting in technical difficulties of proof for the prosecution. To clarify these problems guidelines are provided by the law makers suggesting that age groups under 15 years are children. However, in practice (which has not yet been established in court), the main criterion to define children will probably be whether the courts decide that the child was not yet entered or only just seems to have entered puberty (Greve, Larsen & Lindegaard, 1980, p. 240).

Section 232 of the 1930 Code, contains the same wording as section 185 of the 1866 Penal Code, provides additional protections against offences of indecency involving pornography. It provides punishment (from a

fine up to four years of prison) to any person who "by indecent behaviour violates feelings decency or gives public offence." Under this Section, for instance, a person who sends, shows or reads pornography to unconsenting adults or to children can be punished.

Standard Police Regulations, Section 12(1) defines the public display of writings and pictures "of an offensive (obscene) character, "and section 10(3) proscribes the distribution into houses of such writings and pictures to persons who have not ordered them. While provisions of this nature existed before 1969 "decriminalization" of pornography, they were partly amended and partly imposed in a circular by the Department of Justice in 1969. This was done to ensure that people were not unwillingly exposed to obscenities, whether in the form of displays in pornographic motion pictures, or in the form of advertising brochures from pornography firms distributed to people at random. (See also Greve, Bondo & Schart, 1981, p. 128 and 134ff.)

Similarly, postal laws forbid the mailing of obscene material to persons who have not ordered it. Denmark's continued adherence to international postal conventions forbid the <u>mailing</u> of pornographic material (even solicited) to countries where such material is forbidden. This provision does not apply to the shipment of pornography abroad through private agencies.

2.1.1 Film Censorship in Denmark

Until 1969, all films were censored by the Board of Film Censors. The film could be

classified as being totally forbidden (extremely rarely done), released to all audiences, or restricted to persons under 16 years. Release of a motion picture could depend on removal of certain parts, which were considered by the Board of Film Censors, to be either too explicitly violent or sexual. Criteria of violence and sex were also applied to the child protection rating. The criteria obviously changed considerably overtime and especially during the years before the repeal of the pornography ban and of adult film censorship. During the 1960's, the emphasis clearly changed in the direction of greater leniency regarding nonviolent sex, and eventually only explicit violence became grounds for censorship cuttings.

In 1969, the new Cinema Law removed censorship of motion pictures. Films could be shown to adults in licensed cinemas without passing the Board of Film Censors; however the film had to be labelled, "Restricted to persons over 16 years of age." The board had to approve films that the distributors wanted to show the children. The following ratings could be applied: "Restricted 16 years" using criteria gross violence and hard core pornography or "Forbidden to children under 12 years of age" using the criteria explicit violence and sexual scences.

Until 1972, a very strict licenses system prohibited the showing of films (including pornographic ones) on unlicensed public premises. License to run a public cinema was granted under

tight restrictions and could, in principle, be withdrawn if the owner did not keep up to a certain standard. In practice, however, no interference occurred especially 1969 when a few public cinemas began showing hard core pornographic movies quite regularly, and in 1972 the restrictive Cinema Law was replaced by a very liberal one, where a license was given to any applicant on conditions solely regarding health and fire standards of the premises.

Television broadcasting of films is not subjected to the cinema laws, but films not deemed by the Board to be suitable for children are usually shown late in the evening, and the announcer will comment that the "film is unsuitable for (young) children." Video films for private use are exempt from all censorship and in 1983, a working party of the Governmental Media Commission recommended a voluntary system of "control" implying only positive guidance of video films consumption for children: Lists of recommended video films are to be issued by a board regularly and placed in shops, libraries, and so forth.

2.1.2 The Availability of Pornography

Both production and contents have currently been studied (see Kutchinsky, 1973, 1983). Sales of pornographic material sharply decreased after an initial short period and during the months before and after the repeal of 1972. Due to the easy accessibility of crossing national and language borders, there is a considerable export

of pictorial pornography, which has resulted in a steady level of production.

Regarding the contents of pornography, no significant changes have occurred (except for the disappearance of child pornography over the counter) since the full spectrum of pornography became available around 1971. Contrary to claims 4 that violent pornography is increasing, the fact is that such themes as rape were more frequent in the pornography of the early 1970's than today. The explanation for this seems to be a very local one; one of the significnt producers of pornography in the pre-repeal and immediately post repeal days appear to have been by personal inclination to sadomasochist. The major publication "Weekend Sex", which appeared in several languages, regularly featured a soft core fashion of sadomachochism. When the publisher died in the mid 1970's, his publications reverted to the mainstream of pornography, continually illustrating "ordinary heterosexual orgies".5

The selling of pornographic material to minors is not regarded as a social problem in Denmark. If children want pornography, they may

This claim stems from the USA, where violent pornography was only becoming available around 1975.

It is estimated that ordinary heterosexual orgies constitute 95% of all pornography. As well, it is estimated that "violent pornography" constitutes between one and two percent of the quantities of hard core pornography, which in turn constitutes about one percent of the printed mass entertainment media.

very easily obtain it. For example, they can view pornography from the small selection of pornographic literature available in some ordinary news stands (this represents no offence, as long as the material is not sold to them) or they can obtain it from vending machines. If one child has a pornographic magazine, it is often passed among the children. Institutions for children have adopted a very permissive attitude vis-à-vis pornography and very positive results of this policy have been reported (see Kutchinsky, manuscript). The general impression is that Danish children, having seen and having such an easy access to pornography, display remarkably little interest in it.6 Perhaps one of the reasons for this is the obligatory sex education in schools and the easy availability of very explicit sex education and fiction literature on sexual matters for children in public libraries.

2.2 Law Enforcement Policies

Prior to 1960, there were very few prosecutions of pornography, no more than a handful, altogether before hard core pornographic magazines and films began to appear after the mid 1960's. Although large amounts of hard core magazines were seized by the police, there were few prosecutions and in some cases, the material was later returned to the trade people when it became legalized in 1969.

It is unknown to what extent puberty children will use pornography for masturbation.

There have been few prosecutions pursuant to the present Section 234. Only one case is recorded, where the owner of a pornography shop was accused of having sold pornography to persons under 16 by placing a vending machine with pornography outside the shop. The Supreme Court acquitted the defendent in 1971, because the attempt to sell pornography is not punishable and there was no proof that sale to minors had acutally taken place.

Under the 1980 Child Pornography Act, no case of transgression have been prosecuted. In fact, child pornography disappeared from the distributor's catalogues, the shelves of Danish producers, wholesalers and retailers as soon as it became obvious that the Bill would be adopted. The apparent reason for this is that the demand for child pornography was very limited (see Kutchinsky, 1980 and 1983).

Considerable effort was made by police and prosecution to control public disply of pornography, unlicensed film performances (before 1972) and live sex show performances. Since 1969, there is a very specific and relatively restrictive policy on public display of sexually offensive pictures, whereas before the amendment to Section 234 in 1969, whatever was sold inside a sex shop could also be on display in the windows.

Along with the repeal of 1969 police introduced regulations explicitly prohibiting public displays which might be offensive to causual passerby. The policy adopted was much more restrictive than that regarding the definition of obscene in relation to

Section 234 (sale of pornography to minors). A display window (e.g., outside a pornography shop or a cinema showing pornographic movies) was considered offensive and the owner was liable to a fine not only if the show window taken as a whole contained a single picture explicitly showing sexual organs or sexual behaviour. Although the police were actively trying to enforce these regulations, it had taken some years (and the appearance of pornography shops in the most fashionable shopping street of Copenhagen (Stroget) before the control of public display was effective. This development can be seen from the following statistics. In 1969 (year of repeal and new police regulation), six pornography shop owners were fined (300-600 kroner -at that time 7,50 kr was about equivalent to one U.S. dollar) while two received warnings from the court. Sixteen other owners were called to order by the police and instructed as to the kinds of displays could be accepted. In 1970, 17 shops were fined and two received warnings from the court, while 10 were called to order and instructed by the police. The appearance of pornography shops in Stroget, where many people, often families, would take their Sunday afternoon stroll, led to too much public outrage and even questions in Parliament to the Minister of Justice. Consequently, enforcement efforts were strongly sharpened. Between July, 1971 and September, 1972, under Police Regulations Section 12, about 60 cases of transgression were brought to court; and not only were the owners fined ranging from 500 to 1,500 kroner, but shop assistants were also fined, ranging from 500 to 1,000 kroner. Some cases were appealed to the High Court which in all cases increased the fine and in one particular case, a defendant recieved a fine of 5,000 kroner.

These measures proved effective. A habit of subdued pornography displays was instituted, and during the following years, transgressions became remarkably few. Although recent jurisprudence suggests that the very strict display rules during the early 1970's are no longer applicable (See Greve et al., 1981, p. 158), pornography shops and cinema displays in Denmark are among the most decent in major cities of the Western world.

2.3 Public Opinion and Current Policy Trends

The first public opinion poll on pornography, conducted in 1965 was only concerned with books. The survey showed that 46% of the polled population was in favour of legalizing pornographic books of all kinds. In 1968 another public opinion poll revealed that this figure had increased to 61%. (In both polls only a small minority of the people sampled were in favour of restrictions, while the remainder were undecided.) Interestingly, the figure in favour of repeal had increased from almost a minority to an absolute majority during the period when the repeal of banning pornographic books actually had taken place in 1967. A similar development also occurred relating to pictures. In may, 1968, people were asked, for the first time, whether they thought pornographic pictures ought to be legally available to customers; in this case, 49% said yes. In 1970, one year after the repeal of banning pornographic books had been executed, 57% of the individuals sampled declared they were in favour of the decision.

Presently, there is a group of women combatting pornography. Their views expressed in newspayer

debates and occasionally semipublic discussions are in most regards in concord with those expressed by their "mother organizations" in the USA (mainly "Women Against Pornography"), from whom they also receive most of their facts and arguments about pornography. As a group, they do not advocate a return for the prohibition of pronography. Instead individuals adhering to the Danish feminist movement have called for prohibition of viedo tapes expressing gross violence and degradation of women. In general, Danish feminists tend to see pornography as a sometimes very bleak, but, at least as far as the Danish scene is concerned, rather trivial symptom of sexual and gender related inadequacies of the industrialized patriarchal society. Many feminists appear to accept pornography as a poor, but under the circumstances acceptable surrogate sexual outlet for certain illfated sexual minority groups such as sadomasochists and pedophiles. Recently, many feminists and others have begun to advocate "counter-pictures" such as warm erotic pictures of love between equals to counteract what is seen as the cold, clinically sexual, degrading pictures of standard pornography.

All sexual crimes except forcible rape, significantly decreased in Denmark between 1967 through 1973. Rape remained essentially steady during that period, but subsequently increased somewhat, especially during the late 1970's and early 1980's. Experts agree that this increase in rape which is much less than the general increase in crimes, and about half the increase of other violent crimes is probably due to higher frequency of reporting brought about by greater awareness rape. Danish experts, including four Danish

feminist criminologists who have studied rape in Denmark, also agree that there is no relationship between pornography and rape. Kutchinsky studied the significant decrease of sex offences against small children in Copenhagen (by 85%) and West Germany (by 60%). He has shown beyond andy reasonably doubt that this decrease is very significant (e.g., not due to changes in the laws or to reduced reporting). In other words, the very strong decrease of registered offences against small children does indicate that there was a real reduction in the number of such crimes committed. Both in Denmark and West Germany the decrease coincides temporarily and exactly with the increasing availability of pornography and several other factors of sexually explicit material. This finding suggests that pornography may in fact have worked as a surrogate for persons (not necessarily pedophiles) who might otherwise have committed sex offences against children.

3. Prostitution

3.1 Legislation

Following the 19th century prostitution was publicly regulated. Although brothels were forbidden in 1901, police control of prostitutes (e.g., regular examinations for veneral diseases) was abolished in 1906. Since then, despite minor changes in the laws especially concerning the severity of punishments, the regulation of prositituion has been essentially the same.

Prostitution is not directly punishable in pursuance of the Danish Penal Code. Section 199 however, contains rules on "idleness" which indirectly enables a certain control of prosititution. According

in such a way that it may be assumed that he or she is not trying to support him/herself in a legal way, must be ordered by the police to obtain a legal occupation. If this order is not obliged within reasonable time, the person is liable to presecution. Subsection 2 of the same Section makes it clear that prostitution as well as living off the avails of a prostitute, and gambling are not to be considered "legal occupations". The obvious purpose of this Section is to provide the possiblity of regulating prostitution without directly cirminalizing it. In practice however, this provision has not been used for many years.

In theory, prostitution can be punished in pursuance of Section 233, making it punishable for anyone to encourage or invite indecency or to display an immoral way of living in a manner which is likely to offend others or to cause public outrage. This provision can, under certain circumstances, be used against the customers of prostitutes. In practice however, Section 233 has not been used since 1934.

These provisions in the Penal Code are supported by police regulations, proscribing offensive forms of soliciting by prostitutes such as Section 5 allowing the police to forbid loitering in certain public places and Section 6 suspecting an individual of being a prostitute.

The promotion and commercial exploitation of prostitution is criminalized according to Sections 228 and 229 of the Penal Code. According to these Sections, a wide variety of offences related to

pimping, procuring, keeping a brothel, and so forth, are punishable. Not only is "active pimping" punishable, but also "passive" forms of "living off the avails of a prostitute," such as a man sharing an apartment with a prostitute after he has received a warning; anyone who encourages or helps someone under 21 years of age to become a prostitute; and anyone for example, hotel owners, who rent facilities to prostitutes at excessive rents can be punished.

Homosexual prostitution was specifically punishable until 1967, and between 1961 and 1965 it was punishable for customers to obtain homosexual relations with someone under 21 years of age for a payment or the promise of payment. Since 1967, homosexual prostitution has been regulated or not regulated according to the same rules as heterosexual prostitution, except for a man living off the avails or sharing the dwellings of a prostitute.

3.2 Law Enforcement and Social Policies

3.2.1 The Size and Nature of Prostitution

According to an estimate by the Copenhagen police, there are approximately 300 street prostitutes in Copenhagen. This figure however, must be considered as a very rough approximation. There are no estimates on other forms of prostitution or in other parts of Denmark. One popular mid-morning newspaper carries several small advertisments for prostitutes, "massage parlours", "call girls" and "escorts". (On the basis of these ads, a most uncertain estimate has been made to the effect that there are altogether

around 2000 part or full time prostitutes in Copenhagen and surroundings.)⁷

In Denmark, window soliciting is virtually unknown and there are very few brothels. Most common are places where one or occasionally two to three women work together in a "massage parlour". It is estimated that in Denmark there may be a few hundred such "massage parlours" at any given time. There are no more than a score of sex clubs and sex saunas, at least insofar as they are related to prostitution. However, there may be more of such places on a purely non-commercial "exchange" basis.

During the past fifteen years, there was a growing number of drug addicted women who worked as street prostitutes. No specific information exists on this topic either. According to the Copenhagen police, however, the problem has been constatnt for some years.

3.2.2 Law Enforcement and Other Policies

Since the mid-1970's there has been little reaction against prositutes. The special vice squad dealing with prostitutes, drugs and related issues have been abolished, and proceedings against prostitutes in pursuance of the "idleness"

Since a rather qualified estimate suggest that around 1850 Copenhagen (which at that time had a total population ten times smaller than today) had about 800 prostitutes. There is little doubt that from a historical perspective, prostitutes have been strongly decreasing (Hartmann, 1949).

Section (199) have ceased when the massive unemployment made it difficult for anyone to get a "legal occupation". Moreover, social aid is considered a legal source of income, a fact which makes Section 199 invalid in practice. The present policy by police is that of noninterference as long as other criminal offences (e.g., rape, intercourse with minors, violence or drugs) are not involved. Police regulations concerning street soliciting are rarely used because the policy is to interefre only if prosititution is restricted to a very narrow area of towns (by tradition, no "zoning" regulations), there is little cause for intereference. Exact figures on soliciting are not available; in fact, the annual police reports of Copenhagen and for Denmark as a whole contain no reference at all to prostitution.

Since the abolition of the vice squad in 1971, reactions against the exploiters of prostitution have also been steadily decreasing. Exact figures are available only from 1960 to 1970. These are as follows:

Keeping a brothel - no arrests observed;

Encouraging or debauching prostitution - 1960 to 1970 a total of 43 charges of which 34 were convicted (mostly unconditional prison sentences). After 1970, very few if any cases;

Pimping and procuring - 1960 to 1970 a total of 113 cases (between 24 and 3 cases per year with a clearly decreasing tendency over the period) of which 57 were convicted. Since 1970, few cases (see below);

Living off the avails of prostitution - 1960 and 1970 a totoal of 682 were charged, 360 were subsequently convicted, while 25 were acquitted. Additionally, 472 recieved warnings for sharing the dwellings of a prostitute. Of these, only 3 were subsequently convicted for not changing their situation. In all cases, there was a decreasing tendency during the period.

Since 1970, the only figures available are estimates on the total annual convictions of all forms of exploitation of prostitutes.

The average annual number from 1970 through 1978 was approximately 25 cases, with a decreasing tendency, 18 persons were convicted in 1977 and 16 in 1978, of sentences rather than fines.

This obvious decrease in charges and convictions since 1960 is not only due to a more lenient policy towards prostitution but in the number of case of exploitation, and a change in the patterns of prostitution. The 1950's and 1960's were characterized by a considerable amount of pimping, and the prostitutes gradually becoming much more independent. Furthermore the reduced criminalization of prostitution has reduced the need for pimps, and it is today generally agreed upon that the relations between a prostitute and a man who is sustained by her are, with rare exceptions, voluntary. The majority of prostitutes are probably economically independent, although they may live with and partially support another partner. development also coincides with and partially a consequences of an apparent "deprofessionalization" of prostitution. It seems that an increasing proportion of prostitutes are working part time for example, to supplement

unemployment insurance or other forms of public relief. Under these circumstances, it has become policy not to interfere with anyone living occasionally with a prostitute. Although no figures are available for recent years, it appears that Section 199, Subsection 2 concerning "living off the avails" has become obsolete.

Prostitution by minors is regarded as a more serious matter than that of adults, especially if the minor is under 15 years of age or if related to drug dependence. Street level guidance clinics operate in the neighbourhoods concerned, and various forms of help are offered by public and semipublic (church) institutions. There are no clear estimates of the size of this problem, but it is widely agreed upon that there is a social problem of women between the age 12-18, who are usually drug addicts, working at the very bottom of the "hierarchy of prostitutes", and little is done about it because of the lack of money. The Copenhagen police has observed no growth in this problem over the recent years.8

3.3 Public Opinion and Current Law Enforcement Trends

Danish feminists have expressed concern over what they regard as the growing problem of prostitution.

However, a report published in May 1984 by the Divison for the Prevention of Juvenile Delinquency of the Copenhagen Police Department indicated that in 1982 the police have filed ten "social reports" on women prostitutes under the age of 18 including one which was under 15 years of age. In 1983 the figure increased to 21 "social reports" including four women under the age of 15.

Their arguments and views are based largely on extensive reports and studies from Sweden and Norway. Prostitution is seen as an extension and expression of the suppression of women in the modern patriarchal society, girls and women are forced into prostitution by economic and social circumtances, and they lead a miserable life and are more or less severly damaged by it. Contrary to feminists in Sweden and especially those in Norway, most Danish feminists want social action to help women get out of prostitution; more general and long term policy level; and a change in gender relations and the view of sexuality, especially male sexuality. Public education and exposure are seen as appropriate measures in this regard. The moderate expressions among the majority of feminists invovled in the debate which takes place in newspapers, journals and at public hearings tend to view prostitutes' client as being victims of oppressing sexual patterns, while a more extremist minority want criminalization of customers.

In contrast, this view is counteracted by a movement of radical sexual policy advocaters including some feminists and prostitutes who consider the feminist anti-prostitution movement a reflection of neopuritanism and middle class bigotry rather than concern for the prostitutes. They claim that prostitutes enter this occupation on their own free will; that they enjoy their work; are proud of the help they can offer to sexual minorities; and they want to combat the stigmatization and crminalization of a trade which is, in their opinion, only second to any other trade because of this social ostracism. In fact, while feminists against prostitution have not organized

themselves, pro-prostittion groups recently have (December, 1983) formed an organization with the purpose of promoting prostitution as a free and proud occupation. This organization, which is to serve also as a sort of trade union for prostitutes, was formed after a five week campaign of exhibitions and hearing in Copenhagen.

Government reports on prostitution were issued in 1955 and 1973. The latter proposed a removal of Penal Code Section 199 and replacing penal measures against prostitution with social ones. As far as exploitation is concerned, one Government proposed to repeal only the punishments for "passive pimping". These proposals were never brought before Parliament, and nothing has been done about it since. The suggestions of the Government committee reporting in 1973 have, however, become legal practice. No new legislation is expected to be passed nor any new policy to be developed in the near future. On a longer term, it is likely that the present legal practice may also become law.

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CHAPTER VI

EXPERIENCES WITH PORNOGRAPHY AND PROSTITUTION IN SWEDEN

1. Introductory Remarks

The Kingdom of Sweden is a constitutional monarchy and a unitary state with approximately 8 million inhabitants. The legislative powers are mainly embodied in Parliament consisting of one chamber (Riksdag). The Supreme Court decides on matters of law. The Swedish penal system recognizes the principle of legality. This means that the prosecutors in most cases are bound to prosecute if they believe a conviction can be obtained.

2. Pornography

2.1 Legislation on Pornography

Before 1970, there was a provision in the Penal Code, on offences against morality and decency. This provision implied that it was punishable to sell, show or otherwise distribute a publication or picture which offended propriety or morality. This provision was superseded by a new law on pornography in 1970. new law, which was preceded by a report of a special committee, rests on the view that a person who wishes to view pornography should decide this for himself. On the other hand, no one should be forced against his will to be faced with pornographic representations which may be regarded as an offence against morality or offensive to propriety by a substantial part of the community. It was considered important to break the trend in recent years towards an increasingly uninhibited dissemination of exceptionally daring pornographic products among persons who do not wish to

take note of them. Only certain forms of dissemination of pornographic representations have therefore, been made punishable under the new rule. Otherwise all pornography, written and pictorial, has been made freely available.

Chapter 16, Section 11, Penal Code states that:

a person who, on or at a public place, exhibits pornographic pictures by means of displays or other similar procedures in a manner which is likely to offend the public, shall be sentenced for unlawful exposition of pornographic pictures to pay a fine or to imprisonment not exceeding six months.

The same applies to a person who sends through the mail to or otherwise furnishes another person with pornographic pictures without his previous consent (eff. 1970).

In an explanatory memorandum on the law on pornography, pictures are considered to be pornographic if they portray sexual acts in an explicit and provocative way without having any scientific or artistic value. In determining the pornographic character of a picture, the courts are expected to base their judgements upon its objective characteristic and to disregard the author's intentions.

According to the Minister of Justice, all types of pictures fall under the provision, whether they are produced through a printing machine or by other means. Sculptures, three dimensional objects and films also fall under the prohibition. Displays or other similar exhibitions or pornographic pictures are punishable not only if they take place in a public place, but also at

places like in shop windows which face the street or other public places. The intention behind the provision is to criminalize displays or similar exhibitions of pictures in pin up magazines or similar publications which for example, show sexual intercourse or, in a importunate and detailed way, depict genitals.

The prohibition in Section 2 also includes pornographic pictures sent through the mail. The objective of this Section is to control the vast export of advertising brochures and similar publications of a pornographic character from Sweden. The offence is completed when a person delivers the picture to a post office. Oversea postal deliveries also fall under this provision.

According to Chapter 16, Section 12, a person who distributes among children or young persons a writing, picture, or film which due to its content may coarsen or otherwise involve serious risk for the moral development of the young, shall be sentenced for leading youth astray to pay a fine or to imprisonment not exceeding six months (eff. 1965). A person can be punished for the distribution of pornographic material which is occupational or in a planned manner aimed at children or youth. This includes, for instance, the distribution of advertising brochures in the neighbourhood of a school or other places where youngsters gather. Distribution through ordinary book shops or incidental selling or delivering to a person under a certain age does not fall under the scope of th provision.

No specific age limit has been settled in connection with the offence "leading youth astray." It was regarded by the government not to be suitable to fix an

age limit. The aim of the provision should serve only as an appropriate guideline for the courts. The Minister of Justice, for example, mentioned that the academic youth as a category and men serving in the military for the first time are groups not protected by the provision.

In 1979, a new provision was enacted concerning child pornography. A person who portrays a child in a pornographic picture with the intent of distributing it, or who distributes such a picture of a child shall, unless the circumstance make that act defensible, be sentenced to pay a fine or to imprisonment not exceeding six months for violation under child pornography offences (Chap. 16, Section 10, Penal Code, eff. 1979).

One reason for introducing a new provision on child pornography is the harm done to a child's integrity by involving him/her in the creation of a pornographic Whether the reproduction (usually by taking photos) takes place with the consent of the child or not, the act must, according to the Minister of Justice, be considered as a serious intrusion into the child's integrity. A child cannot normally foresee the consequences. In a memorandum explaining the new law, the Minister pointed out that the provision also included cases where the picture is given a special meaning through the child's position or gestures. special age limit is given. The Minister claimed that considering the differences in the development of separate individuals it is not possible to prescribe such a limit. The aim of the provision is to protect young people who have not yet reached sexual maturity.

In the 1976-77 session of the Riksdag (Parliament) a private members' Bill on public pornographic perfor-

mances and sex clubs, and so forth was discussed. The Standing Committee of Parliament on Social Affairs urged for the establishment of a Special Committee on Prostitution which will be discussed in section 3.3.

Concerning public pornographic performances, the report recommended that a prohibition should be incorporated in the Public Order Statute. On the other hand, there is no cause, according to the report, to prohibit variety shows which include nude performances and stripteases. On the basis of this recommendation, the government presented a Bill to Parliament in 1981, which interalia introduced a prohibition of all public pornographic performances. This Bill was enacted by the Parliament and became effective in July, 1982.

2.2 Legislation on the Presentation of Films

The National Bureau of Cinemas is responsible for the legislation regarding the censorship of films. If

Arguments against a ban on these activities include the risk of illegal clubs and opposition to new prohibitions. Another argument presented in favour of a prohibition, however, is the crucial fact of the Riksdag, year after year, having expressed its disapproval of the activities of sex clubs."

The following is a quotation from the report of the Committee on Prostitution (SOV 1981:71): "Where many of the participants in live shows are concerned, the step into prostitution is only a short one. The men patronizing these clubs are confirmed in their view of women as inferior and of sexuality as something apart from other human relations.

Sex clubs moreover, are a comparatively novel feature in our country and do not exist in the other Scandinavian countries. The programmes which are performed cannot be said to enrich the cultural life of Sweden. On the contrary, they run counter to the efforts of society to achieve sexual equality and genuine sexual liberty based on mutual loyalty and comradship.

the Bureau gives a negative decision regarding a film, it is possible to appeal such a verdict to the national government.

According to the legislation, all films must be prescreened and classified before shown in public. These regulations however, only apply to films that are to be shown in cinemas; video films and movies shown on television (which is controlled by a state agency) are not censored.

The decree (1959:348) prescribed that a film may not be licensed if "due to the way in which the events are described and the context in which they take place, it can have a brutalizing or otherwise detrimental effect or incite to crime." An approval can further be refused in cases where the presentation of a film "is deemed to be inappropriate in regards to the state's relations with a foreign state or can lead to informations about facts whose revelation can cause damage to the national defence or otherwise to the security of the state," or where the presentation of the film would obviously be contrary to the law. In short, an intervention by the Bureau is made only if a film contains sadistic pornography or descriptions of extreme violence which are not necessary for the film's general tenor or otherwise artistically justifiable.

The above described criteria are used at the preliminary screening of films that are made for persons 15 years of age and over.

Regarding films to be shown to children and films made for children, the latter will not be licensed if the Bureau has reason to believe that the film will have a psychological effect on the child. According to the ordinance of cinemas, the Bureau can refuse to

license any film made for children if the film is likely to have a negative psychological effect on the following three age groups: children under the age of 7, children between the ages of 7 and 11, and children above the age of 11 and under 15.

In 1981, a law (1981:485) was introduced proscribing the dissemination of films and video films that feature violence. According to Section 1 of the law, it is forbidden to professionally or otherwise commercially distribute to the public through offering for sale, renting, or showing films and video films containing blatant or prolonged descriptions of persons subjected to raw and sadistic violence. The prohibition is applicable only in cases where it is obvious that the distribution is not acceptable. In Section 2, there is a special provision aimed at the protection of children under fifteen. According to this Section, films and video films containing detailed and realistic descriptions of violence, or the threat of violence against men and animals cannot be distributed or shown to children professionally or commercially.

2.3 Law Enforcement

According to statistics recently presented by the press, there was a decrease in the selling of "men's magazines" and other soft pornographic publications.

No official figures are available on hard core pornography, which is sold in special sex shops, and no data are available on the trends in the nature of the pornography sold or produced.

There are no special guidelines or directives for the prosecution of pornography offences. In fact, the Swedish prosecutors are bound by the law to prosecute all cases presented to them by the police.

Criminal statistics on sexual offences are a minor category when compared to other forms of criminality and for that matter, their importance is decreasing. The offences which are of interest for this study are not given separately in the statistics. The Bureau of Statistics however, provided the following information about convictions for offences against Chapter 16, Section 11, (obtrusive exposition of pornography): there were five convictions in 1971; seven in 1972; five in 1973; none in 1974; one in 1975; and there was one conviction in 1976. Furthermore, two cases were dismissed in 1971 and one in 1973. These figures are for the whole country.

It is generally known that very few persons have ever been convicted under Chapter 16, Section 12 (leading the youth astray).

Concerning "child pornography offence" (Chapter 16, Section 10(a), Penal Code) there have only been a few cases reported to the police after the provisions became effective in 1979.

The prohibition of exterior displays of pornography in Stockholm is only routinely inspected by the police. The police conduct inspections at irregular intervals to places where pornographic displays take place notoriously. If the officer is of the opinion that the display is close to the borderline of what is permitted, he points this out to the person responsible for the display. In most cases, this person takes heed to these warnings. Interventions are only made in cases where pictures of sexual intercourse are displayed. Other pictures are deemed not to be illegal

according to present interpretation of the law. Public complaints are very rare. The police maintain that due to their supervision, the contraventions of the law have decreased lately (DsJu 1978:8). The number of police investigations and prosecutions is steadily decreasing. The number of prosecutions for such crimes has been five, at the most, during the last three to four years (DsJu, 1978:8).

2.4 Public Opinion and Current Policy Trends

A survey conducted in 1969 by the Swedish Central Bureau of Statistics, found that 49% of the general population was in favour of the proposed liberalization of most forms of pornography (Zetterberg, 1969). Recently, no special opinion polls have been done in this field.

However, the Committee for the Freedom of Speech, which consists of several members of Parliament, has recently expressed an opinion about pornography in its report "Protect the Freedom of Speech" (1983). The committee claims that the most serious consequence of the sale of pornography, which is said to have increased since the decriminalization in 1970, is that the youth will get a wrong impression of sexual life, love, and the relationship between the sexes. Sex will be dehumanized by the negation of other emotional relations between man and woman than the purely sexual ones. Our knowledge of the effect of pornography on many however, is very defective. From what we know, which is very little, it is not possible to draw the conclusion that the effect of pornography is a purely

negative one.² The committee asserted that the best way for an open society to counter these presumed negative effects is that an effort must be made to change the people's attitudes and make them see sexuality as just one form of human behaviour. The bad influence pornography may have on youth has to be counteracted in ways other than by criminalization. The committee concluded that changes to the present legislation on pornography are not to be recommended.

The committee further observed that contraventions against the prohibition of public displays are still very common. The committee however, did not find it necessary to change the law, but were of the opinion that respect for the law by individuals was lacking. To uphold general obedience to the law was not within the terms of reference of the committee.

Lastly, the committee proposed a change to the present system of censorship of films for adults. Censorship is to remain, but in the future there should no longer be a possibility for the Bureau to prohibit a film from being shown. The task of the Bureau should be to give an opinion on whether a film contains an unlawful description of violence. If the Bureau comes to this conclusion, the film may still be shown. It will be up to the courts to decide whether a criminal offence has been committed or not.

During the last decade, there has been a decrease in the number of registered sexual crimes in Sweden, with the exception of rape. According to a Swedish researcher, Mr. Kühlhorn, it is not possible to prove that among all relevant factors the sale of pornography has had a certain impact on the trends of sexual offences in this connection.

The committee's proposals are now under consideration by the government.

3. Prostitution

3.1 Legislation

During the period 1850 through 1918, prostitution was regulated by law. The arrangement, which involved the registration of the women concerned and an obligation to report regularly for medical examination, was principally aimed at curbing the spread of venereal diseases. The regimentation was superseded by other regulations with the aim of controlling the prostitutes. These regulations have gradually been abolished during this century.

Prostitution as such, is no longer a criminal offence in Sweden. However, acts directly related to it such as the operation of bawdy houses and "living off the avails" are punishable to some extent.

According to Chapter 6, Section 7 of the Penal Code, a person who habitually, for personal gain, encourages or exploits another person's immoral mode of life, or induces someone under twenty years of age to enter into such a life, can be sentenced for procuring to imprisonment not exceeding four years. If the crime is particularly serious, imprisonment for at least two and at the six years, shall be imposed. In judging the gravity of the crime, special attention shall be paid to whether the offender has widely encouraged an immoral way of life or has ruthlessly exploited others. The phrase "immoral mode of life" in Chapter 6, Section 7 of the Penal Code, means entering habitually, extramarital liaisons of a more casual

nature, above all more or less occupational female and male prostitution.

Encouraging another person's immoral mode of life can, according to the law, be done in many different ways: for instance, through operating a brothel or giving addresses of clients to prostitutes.

The provision concerning the exploitation of another persons's immoral mode of life is directed towards pimps, but is also applicable to such cases where somebody profits from another person's immoral mode of life, for example, when a landlord obtains unreasonable rents from prostitutes.

The third case of procuring in Chapter 6, Section 7, namely enticing a person under twenty years into an immoral mode of life, was introduced at a later stage. The aim of this Section is to increase the possibilities of taking action against pimps and prostitutes who entice minors into prostitution. A person who, in order to gain a profit, encourages temporary sexual relations between others, can be sentenced for promoting immorality to a fine or to imprisonment not exceeding six months (amended 1969).

According to Chapter 16, Section 8, a person who, by promising or giving compensation, obtains or tries to obtain a temporary sexual relationship with a person under eighteen years of age, can be sentenced for seduction of youth to a fine or to imprisonment not exceeding six months (amended 1978).

Other provisions dealing with prostitution must be mentioned in this context. According to Section 1 of the Care of Young Persons Act (1980), care is to be provided for a young person without his consent if inter alia the young person seriously endangers his

health or development by drug abuse, criminal activity or any other comparable behaviour. In the Bill, prostitution was mentioned as an example of such behaviour.

According to Section 43 of the Act on Aliens (1980:376), an alien may be expelled if he/she makes a living from prostitution.

In 1981, an additional provision was introduced in Chapter 12, Section 42 of the Real Property Code, 1970, implying that the right to rent is forfeited and the landlord thus entitled to cancel the agreement if the flat wholly or to an essential part is used for commercial or similar activities, which constitute, or to an essential part involve criminal activities.

According to a memorandum explaining the section, one example of such activities is the situation where the tenant uses the flat for prostitution. There are no zoning regulations, or other police regulations concerning prostitution in Sweden. Soliciting for the purpose of prostitution has not been criminalized.

3.2 Law Enforcement and Social Policies

3.2.1 The Size and Nature of Prostitution

According to the report from the Committee on Prostitution (SOU 1981:71), prostitution has considerably diminished in recent years. A comparison made during the mid seventies of five types of prostitution in Sweden, revealed that street prostitution declined by 40%, prostitution as massage institutes and nude modelling studios decreased by 60%, and sex club prostitution had dropped by 80%. Hotel and restaurant prostitution and call girl activities

have also declined. The reason for this decrease may be that in recent years much attention has been given to prostitution by the media, the police, the courts, political bodies, and social welfare authorities.

Large number of people however, are still involved in prostitution. Every year about 100,000 men are active as clients, 2,000 women as vendors and an estimated 2,000 persons as procurers. About 1,000 of the women involved are street prostitutes, some 500 are prostitutes is massage institutes, and studios, about 100 are sex club prostitutes, and more than 300 are "high class" prostitutes.

The allegations frequently made that many young girls become prostitutes and that prostitution is affecting progressively lower age groups have proved groundless. Less than 5% of known street prostitutes and practically no prostitutes of other categories are under the age of 18. Less than 1% of street prostitutes are under the age of 15. On the other hand, the number of women who have at one time or another, been prostitutes is relatively large. For example, about 2% of the women born in Sweden in the mid fifties have been prostitutes, though many of them have only been for a very short period of time.

Street prostitution is a permanent feature of the urban scene in Stockholm, Gothenburg, Malmö and Norrköping. Casual street prostitution occurs occasionally in about ten other large towns and cities in Sweden.

There are about 100 massage institutes located in the larger towns and cities of central and southern Sweden, but they are especially numerous in and around Stockholm and Gothenburg.

Sex clubs exist in Stockholm and Gothenburg and in four other cities in central and southern Sweden, though not in Malmö. Prostitution occurs at sex clubs in the provinces, but no such activities were observed at the clubs now operating in Stockholm and Gothenburg.

As a result of live shows being banned by a new law in 1982 on pornography, the number of sex clubs might have recently declined further.

Hotel and restaurant prostitution probably occurs in most of the major towns and cities where suitable facilities are available. This type of prostitution, like call girl activities, is difficult to chart in detail because of its nonpublic character and the reticence of those involved.

Most women prostitutes come from the group with the greatest social difficulties. Crime and drug abuse are many times more common among them than among average women. About half of the known women street prostitutes have criminal records, as against two or three percent of the female population as a whole. About 25% of studio and sex club prostitutes have previous convictions, the most common offences being minor offences against property and drug offences. The proportion of drug abusers among women prostitutes varies considerably from one locality to another. In Malmö, for example, practically all known street prostitutes are drug abusers, while the corresponding figure in Stockholm can be put at roughly 25% of the known street prostitutes.

The men/clients can be roughly divided into two groups. The overwhelmingly predominant group comprises a cross section of ordinary Swedish men, often married or living in a permanent relationship and with children. The other group comprises of men from the underworld many of them with serious criminal records.

The procurers can be divided into very different groups. The largest of these groups comprises of domestic procurers, while a smaller group is made up of professional procurers. Advertisers, landlords and sex club proprietors are also classifiable as procurers in many cases.

Where prostitution is concerned, finance is an important topic of discussion. Gross prostitution earnings in Sweden during 1980 was estimated at Skr 120 million, with massage and studio prostitution accounting for the largest share, about Skr 65 million. After deduction has been made for overheads and salaries of various kinds, an estimated Skr 30 million remains for investment in capital goods and savings for the procurers.

The impression that prostitution is common among homosexuals does not appear to be true. In Stockholm and Gothenburg there are probably a few dozen young men or boys in each city who are to a greater or lesser extent involved in prostitution.

3.3 Law Enforcement

There are no guidelines or directives for the investigation and prosecution of prostitution offences in Sweden. It must be noted however, that prosecutors are bound by the legality principle. It must also

be pointed out that Sweden does not have any national or local prohibition on soliciting.

Police statistics show that the number of persons suspected of procuring has oscillated around 30 in the period 1960-1982. The number of persons suspected of seducing a person under the age of 18 to give a sexual favour in exchange of money has oscillated around five during the sixties and seventies but has recently shown an increase.

Tables 6 and 7 give an overview of the sentences for procuring and seduction of minors in the period 1974-1982.

TABLE 6
Sentences for Procuring in Sweden between 1974 and 1982

Year	Imprisonment	Probation	Conditional Sentence	Fines	Total
1974	8	2	3	1	14
1975	19	4	5		28
1976	24	8	3		35
1977	23	7	4	2	37
1978	24	3	4	-	31
1979	29	2	5		36
1980	22	10	_	-	33
1981	9	3	2	1	16
1982	11	2	-	and the	14

TABLE 7
Sentences for Seduction of Youth in Sweden between 1974 and 1982

<u>Year</u>	Conditional Imprisonment	Fines	Total
1974	-	4	4
1975	600	. 5 .	. 5
1976	444	1	1
1977	_	1	1
1978	. -	****	,
1979		1	2
1980	1	7	. 8
1981	1	1	1
1982	_		-

3.4 Social Policies

Much has been done by public authorities and social workers to reduce prostitution, especially in Stockholm and Malmö. Intensive outreach activities have been undertaken.

In Parliament, the subject of prostitution was extensively discussed during the 1976-77 session in connection with a private members' Bill on sex clubs and public pornographic performances. As a result of this debate, a Committee on Prostitution was established which submitted a report in 1981 (see paragraph 2.1).

The committee recommended that, in addition to certain measures of a more legal nature, the social measures undertaken in Stockholm and Malmö be extended to other towns and cities where street prostitution exists. The measures taken should be aimed at instructing and assisting the men who purchase the services of prostitutes. Reference is made to the useful role which could be played by the Church and

voluntary organizations both in a practical context and by means of debates and information on interpersonal relations. An entire chapter in the report is devoted to information and public education. The following suggestions were made: youth receptions; mother care centres and similar institutions provide good opportunities to disseminate necessary information; compulsory military service could be used as an opportunity of establishing better contact with men; trade unions and a host of other organizations and institutions could provide natural channels for the encouragement of debate and the distribution of information. The RFSU (National Swedish Association of Sexual Information) also has an important part to play in this context.

Based on the report, the government presented a
Bill (prop. 1981/82:187) proposing certain measures
to prevent prostitution. It was stated that
prostitution never could be accepted and that several
different circumstances influence its prevalence.
Therefore, efforts in many fields must be made in order
to counteract prostitution. For instance it is
necessary for a society to be able to offer people, and
particularly women, social and economic security. As
well, it is essential to provide open and objective
education and information about sexual matters both in
school and later on in life.

The Bill, stated that a comprehensive effort will be made by different authorities and organizations in order to prevent prostitution. In the Bill, the government announced that resources will be provided for social research aimed at developing prevention methods. Funds will be made available for different research projects directed at increasing the knowledge of the customers of the prostitutes and of young girls who run the risk of becoming prostitutes. The proposals of the Bill were endorsed by Parliament and became effective in July, 1982, together with a new law on public pornographic performances.

3.5 Public Opinion and Current Policy Trends

Recently, no relevant public opinion polls have been conducted on prostitution in Sweden.

In 1982 however, the Committee on Sexual Offences, a committee in which the Swedish women's movement is strongly represented, published a report on "Rape and Other Sexual Abuses" (SOU; 1982:61). The report proposed several amendments to the Penal Code provisions on sexual offences. An essential part of the Committee's task was to consider what penal regulations should exist to prevent the exploitation of people by prostitution. Today, it is punishable to have a liaison in exchange of money with a person under 18 years of age. The Committee decided not to propose any stricter criminalization of persons who seek contact with a prostitute for sexual intercourse. standpoint is based on the argument that such criminalization would drive prostitution underground and thus counteract the effort to contact and help those who are engaged in prostitution.

The committee further proposed that those who promote or exploit another person's prostitution must

be criminalized to a greater extent than today. Under the existing law, liability for procuration is limited to those who habitually or for profit promote or exploit another person's libidinous mode of life. The committee proposed that a person who promotes another person's prostitution shall be punishable even if not acting on a habitual basis. A person who financially exploits another's prostitution shall be guilty of procuration. The committee wanted to extend the criminal liability of those who entice other persons into prostitution by making it punishable regardless of the age of the person involved.

An important innovation in the committee's proposals is that a landlord shall be punishable for procuration if he allows another to conduct prostitution in one of his apartments. Criminal liability shall exist in such cases regardless of whether the landlord does or does not collect an excessive rent. The proposal should render it easier to prosecute the owners of brothels and sex clubs.

The proposal regarding procuration should be applicable only to acts in connection with prostitution. A person who enables others to have casual, adulterous, sexual contacts ought not be sentenced for procuration. The proposal contained no penal regulation for the promotion of fornication.

To sum up, the committee's proposals in this respect will lead to the substantial extension of the criminal liability for those who promote prostitution. In addition, acts such as gross procuration (including the preparation and conspiring of) will also become

punishable. Recently, a Bill was introduced to Parliament containing essentially the same proposals as those made by the committee.

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CHAPTER VII SUMMARY AND CONCLUDING REMARKS

Pornography

In spite of the many historical and cultural differences between the five European countries under scrutiny, their penal policies on the dissemination of explicit sexual materials during the sixties and seventies show similarity in many respects.

In the sixties, all countries experienced a sharp increase in the sale of pornographic books and magazines. The courts had great difficulty in interpreting the old obscenity laws. These developments promoted all five societies to reconsider their existing laws and policies on pornography.

In all countries, the issue of the law of obscenity was heavily debated in the public, among the scientific community, and in especially established governmental committees. Finally, it was unanimously concluded by the various committees across Western Europe that the state should not act as a censor morum by prohibiting the dissemination of explicit sexual material as being intrinsically lewd or bad. The experts argued that it is not for the state to prohibit adult citizens from choosing what they may or may not read or view. In addition, the committees concluded that no incontrovertible evidence was found that showed the use of explicit sexual materials is injurious to private citizens or society at large.

On the other hand, it was also generally acknowledged that individual citizens have a right to be free from unwanted exposure to materials which are offensive to a substantial part of the community. The task of the legisla-

ture appeared to be to strike a balance between the right to self expression of some groups and the right to privacy of others.

The second limiting principle, acknowledged almost unanimously by the experts, is the protection of the young against exposure to at least certain forms of explicit sexual materials. According to some, such exposure might be detrimental to their psychological development, while others have stressed that such exposures at any rate interfere with the moral task of parents to raise their children as they think fit.

Several governments have paid heed to experts' opinions by repealing their existing legislation. Denmark led the way by repealing its general prohibitions of the dissemination of explicit sexual texts and pictures in 1967 and 1969 respectively. Sweden followed the example set by Denmark in 1970 and West Germany in 1973. In The Netherlands and France, no legal changes have yet been carried through. In the latter countries, a process of <u>de facto</u> decriminalization by means of increasingly permissive judicial standards and prosecution policies has taken place instead.

In Denmark, Sweden, and West Germany, the principle that nobody should be involuntarily exposed to grossly indecent materials was laid down in new laws prohibiting obtrusive methods of disseminating such materials (the aggressive window displays and unsolicited mailing). In The Netherlands, a Bill is pending which seeks the replacement of the existing general prohibition by a focussed prohibition.

In Denmark, the sale of pornographic pictures or objects to a person under the age of 16 years is still prohibited. Sweden and Germany have retained elaborate legal provisions prohibiting the distribution of pornography

to youngsters. In France and The Netherlands, such a prohibition forms part of the existing laws.

Worthy of a special commentary is the subject of film censorship. In line with the views on pornography espoused in the late sixties, the prescreening of films was criticised for being paternalistic and elitist. The old systems of prescreening and licensing all films were abolished in Denmark (1969) and The Netherlands (1977), but retained in Sweden, France and West Germany (in the latter country, the prescreeing is a form of self regulation by the film industry). In Sweden, the licensing scheme for films has recently been criticized by a governmental committee. In Denmark, Germany and The Netherlands, special boards were embodied with the authority to license films for public presentation to the young.

In the late seventies, it appears that the debate on pornography was reopened to a certain extent. Contrary to the situation in the previous decade, several concerned groups now demand from the government more stringent prohibitions and, or, prosecution policies. Two largely independent social factors seem to have propelled the current "back lash" on pornography. First, pornography is condemned by many feminists as sexist and discriminatory against women. Secondly, feminist authors have, in particular, criticized the distribution of materials depicting sex with young girls and sadistic acts. The new criticism against pornography was aggravated by the recent increase in the sales of video films of a pornographic or sadistic nature.

In response to this new criticism, Denmark (1980), and Sweden (1979) have enacted laws prohibiting child pornography. In Sweden, public pornographic performances have been outlawed in 1982. West Germany's pornography laws of 1972 already contain a provision prohibiting the distribu-

tion of hard core pornography depicting pedophilia, sodomitic or sadistic acts, and a unique provision prohibiting materials portraying extreme acts of violence. These prohibitions will now be made more stringent. In The Netherlands, the new Bill on pornography is still pending as a result of the opposition by feminist groups.

With regard to video films, Sweden has enacted new laws in 1981 prohibiting the distribution of video films depicting acts of extreme violence. The government of West Germany also intends to make the dissemination of video films among the young subject to the same licensing regulations as normal films. France imposed a special tax regime upon pornographic video films in 1983.

To sum up, the five European countries studied, have all liberalized their laws or policies on the dissemination of pornographic materials in the late sixties or early seventies in one way or the other. The new prohibitions are mainly targeted against obtrusive forms of distributing such materials. Besides, the existing prohibitions on the dissemination of explicit sexual materials to the young have been retained. In fact, the enactment of new, more permisive laws has often been justified by the expressed wish to focus the efforts of the police and the public prosecutors upon obtrusive forms of distribution and distribution among the young. The validity of this argument appears to have been confirmed by the facts. In Denmark and Sweden, the sale of pornography has become more discreet after the liberalization. In France and The Netherlands, the old obscenity laws were retained but, in reality however, few controls are currently exercised over the dissemination of pornogrpahy.

In the late seventies, the pendulum has clearly started to swing back as a result of the feminist critique of the dehumanizing, degrading, and discriminatory aspects of some forms of pornography. There are no indications however, that the legislative and other changes of the sixties will be made undone. The newly proposed or enacted prohibitions are no longer targeted against explicit sexual materials per se but mainly at materials depicting deviant sexual activities like pedophilia and sadism or other acts of extreme violence.

Prostitution

At the turn of the century, prostitution in Western Europe was generally controlled by means of a regulatory system known as "registration." The main elements of this system were: the licensing or condoning of bawdy houses; a central registrar of known prostitutes; and the obligation of regular medical examinations for registered prostitutes.

The campaign for abolition, that is, for abolishing the system of registration, started in England but soon gained momentum across the European continent. The prevailing regulatory systems were increasingly criticized as tolerating sexual permissiveness by men on the one hand, and repressing prostitutes on the other. The system was abolished in Denmark in 1901, in The Netherlands in 1911, in Sweden in 1918, in Germany in 1927, and in France in 1946.

The abolishment typically meant the repeal of the system of registration for prostitutes. In Germany and France however, the obligation of regular visits to a health inspector were retained. In Germany, prostitutes are still under this obligation. In France, it was repealed in 1960. As part of the abolition laws were enacted prohibiting the operation of bawdy houses and other forms of procuring (including living off the avails).

In most countries, the new provisions on procuring and living off the avails were amended several times.

Presently, the prohibitions in France (amended in 1958 and 1975), and Sweden (amended in 1982) have the widest scope. The Swedish government has submitted a Bill to Parliament which will widen the scope even further. In West Germany, only certain forms of exploitative procuring and pimping are covered by the new 1973 law. The government of The Netherlands has prepared a legislative change in the same direction. In Denmark, prosecutions for procuring and pimping became very liberal in 1970.

None of the five countries have enacted laws which prohibit the act of prostitution. In Sweden, solicitation for the purpose of prostitution is not prohibited either. In Germany, France, The Netherlands, and Denmark, either national or municipal legislatures have passed bylaws prohibiting certain forms of street solicitation. In West Germany, the courts demand evidence that a prostitute has actually contacted a client for a conviction under the local provisons of soliciting. The French national law distinguishes two different forms of soliciting; namely, active, and passive soliciting. Passive soliciting encompasses all acts or gestures which can reasonably be interpreted as attracting customers for the purpose of prostitution. In The Netherlands, most city councils have passed police regulations which make liable to a fine all known prostitutes who loiter or wait in or at public places.

In several cities in West Germany and The Netherlands, the prohibitions of soliciting do not apply in certain areas or streets. Especially in some Dutch cities, street prostitution is effectively contained within small areas by means of zoning regulations, supported by various administrative measures. The success of such policies of selective control appears to be dependent largely upon the appropriateness of the zones selected for prostitution, both from the perspec-

tive of the local residents and the prostitutes. The "eros centres" in certain German cities seem to be rather unpopular with the prostitutes. In Holland, the assignment of certain new prostitution areas has been met with violent opposition from the residents.

According to official estimates, the number of prostitutes has declined in Sweden over the past years. This is not the case in the other four countries. From a general European perspective, the abolitionist has not effected the number of prostitutes in any discernible manner over the last fifty years. Neither the various forms of prostitution nor the public nuisances associated with it have shown a declining trend. At the same time however, the need to fight the repression and discrimination against women, of which prostitution is often considered to be the archetype, is felt more keenly now than ever. These facts have prompted the governments to reconsider the underlying assumptions and the objectives of their policies on prostitution.

In the area of prostitution these European governments are faced with three fundamental dilemmas. First, a general and stringent prohibition of all forms of procuring appears to be desirable with a view to the prevention of the exploitation of women. In practice however, such prohibitions often appear to have serious negative side effects for the prostitutes themselves. Only a small minority of the prostitutes are capable of carrying out their work on their own premises without any form of organizational support from others. For this reason general prohibitions of procuring often force them to work either in illegal sex clubs, etc., or on the streets. In both cases, the prostitutes are particularly vulnerable to expoitation by others. In short, such prohibitions have often been found to be counterproductive in respect to the prostitutes' best interests.

The second and related dilemma is the conflict of interest between the community at large, which sometimes demands a total ban of all forms of procuring including the operation of brothels and the interests of residents of inner city neighbourhoods who are faced with the nuisances caused by street solicitation when such a prohibition is actually enforced.

The third dilemma of present day European govenments in the area of prostitution is the necessity to reconcile the interests of the prostitutes with the interests of local residents. The prohibitions of street soliciting and the policies of zoning are usually welcomed by local residents (at least by those not living in the vicinity of prostitution areas). Such policies however, are naturally opposed by many prostitutes as an infringement upon their right to make a living for themselves.

Recently representatives of the women's movement and other concerned groups in Germany, France, The Netherlands, and Denmark have expressed the view that the interests of both prostitutes, local residents and the community at large are served best by the legalization of certain forms of prostitution. According to these groups, prostitutes should be allowed to carry out their work in an organized setting, either in private clubs, or at addresses in or outside areas zoned for prostitution. In order to facilitate these relatively unobtrusive and safe forms of prostitution, the governments are asked to liberalize certain parts of the existing prohibitions on procuring and soliciting and, particularly, the mere provision of organizational support to prostitutes ought not to be prohibited.

To sum up, in Sweden the governmental policies on prostitution are still clearly targeted against all forms of procuring and will continue to be so in the years to come. In France, the official policy is quite repressive towards

both procurers and prostitutes, but this policy appears to be rather controversial. Presently the law enforcement and fiscal policies towards prostitutes are presently made less stringent. In West Germany, The Netherlands, and Denmark, the drift of the emerging policies is towards a new system of legalized prostitution. The new model however, is different from the old European system of "registration." Although organized forms of prostitution are again permitted under certain conditions, these conditions are now geared towards the promotion of the prostitute's own interest to a much greater extent than in the past. Priority is given to the repression of exploitative forms of pimping.

APPENDIX

QUESTIONNAIRE ON LEGISLATION AND GENERAL POLICIES CONCERNING PORNOGRAPHY AND PROSTITUTION

Explanation: The questionnaire deals with the subjects of pornography and prostitution separately. Each part has three sections, dealing with (A) legislation, (B) law enforcement policies or social policies and (C) public opinion and present trends in legislation or policy. On each of these issues some general questions are asked followed by more specific questions. If the latter questions raise items which have already been covered in a prior answer, they can of course be skipped. All questions are to be answered as completely and specifically as possible.

In order to save unnecessary work we have filled in some answers provisionally on the basis of documents available in Holland. Please check them out for accuracy.

We would like you to submit a complete list of the literature which was used. If personal communications are used as a source, please mention the name and function of the spokesman.

We assume most questions can be answered by consulting books, documents, and research reports. However, we would like to advise you to interview a specialized police officer from a large town on some of the questions on law enforcement of the laws on pornography and prostitution.

It is quite possible that some of the questions are irrelevant in the legal or social frame of your country. Please do not hesitate to say so. On the other hand, it is to be expected that we have overlooked certain aspects of

the subject that appear to be important. We want to urge you to elaborate on these aspects as much as possible. Some of the most valid information might be contained in it.

We wish you good luck with the work.

Pornography

Working definition

Materials (publications, film etc.) and/or performances of a sexual nature considered to be obscene, indecent etc.

A.(1)General questions on legislation

- 1. All present provisions in the criminal code (federal, provincial) and in police regulations. If relevant, any other provisions (e.g. law on film censorship, customs act, post act.)
- Important jurisprudence on these provisions. Please specify.
- 3. Brief overview of all jurisprudence and legislative changes in the 20th century, with an emphasis on changes since 1960. Please summarize the main arguments for these changes as apparent from committee Reports, white papers etc.

A.(2)Special questions on legislation

- 1. Are there special provisions on the sale, etc. to minors? Is there any jurisprudence on that matter? Please specify.
- 2. Are there special provisions on pornography of a special kind (eg. depicting children, acts of sexual violence)? Any jurisprudence? Please specify.
- 3. Is there a system of film censorship? What are the categories, and age levels?

B.(1)General questions on law enforcement policies

 Statistics on annual numbers of arrests for these acts since 1960.

- 2. Statistics on annual numbers of convictions for these acts since 1960.
- 3. Statistics on severity of sentences for these acts (most recent ones).
- 4. Are there any official guidelines/directives for the prosecutors or police officers on arrests or convictions for these crimes? Please specify their contents. How these guidelines changed since 1960?
- 5. What are the present policies of police and prosecutors? What are the criteria for condoning or making arrests? Have there been any recent changes? Please try to answer this question for one large town in particular (preferable the capital). We advise you to consult a police expert on this.
- 6. If there is a film censorship, what are the present criteria? Any recent changes?

B.(2) Special questions on law enforcement policies

- 1. Is there a special policy for the sale etc. to minors? Please specify.
- 2. Is there a special policy on the extent of public display? Please specify.
- 3. Is there a special policy on certain forms of pornography (depicting children, acts of violence, etc.)? Please specify.
- 4. Is there a special policy for the sale of video films?
- 5. Is there a special policy on the participation of children in the production of pornography?

C. General questions on public opinion/policy trends

1. Results of all relevant opinion polls since 1960.

Please give a summary of the findings. Changes of opinion are of course particularly relevant.

- 2. Recently have any concerned groups or experts expressed views on pornography (reports, academic articles, etc.)? Please specify.
- 3. Is there some form of a semi-official opinion about pornography of feminist/woman's lib movements/groups? Any reports, formal statements, etc.?
- 4. Have there been issued any recent new government reports on pornography or have any proposals for new legislation been made? Any Bills pending? Please elaborate on any current debate. Is it to be expected that new legislation will be passed or new policies developed in the near future? Please specify.
- 5. Are there any data on the trends in the sale or production of pornography (increases/decreases)? Are there any data on the trends in the nature of the pornography sold or produced?
- 6. What are the trends in the number of registered sexual crimes? What is the expert's opinion on the relationship between pornography and sexual crimes?

Prostitution

Working definition

Sexual services for financial rewards and all acts directly related to it: operation of bawdy house (brothels), living off the avails (pimps) etc.

A.(1)General questions on legislation

1. All present provisions in criminal law or administrative law on prostitution (incl. street soliciting, operation of brothels, pimps, etc.) on federal and, or, provincial or state level.

- 2. An overview of relevent jurisprudence.
- 3. An overview of municipal bylaws, police regulations, etc. We would like you to report on all regulations in one large town, preferably the capital.
- 4. Please comment upon the historical developments in the legislation and regulation since 1900 with an emphasis upon trends since 1960. What are the main arguments for the present laws or regulations?

A.(2)Special questions on legislation

- 1. Are there any laws or regulations on the customers?
- 2. Are there any laws or regulations which apply a form of licensing to prostitution or the operation of brothels? Please specify the details of such a system (medical check ups, etc.). For one town.
- 3. Are there any laws or regulations which apply a system of zoning to prostitution or the operation of brothels (condoning it in certain areas only)? Please specify for one town.

B.(1) General questions on law enforcement and social policy

- 1. If possible an estimate of the present number of prostitutes (women, men). Please report on one large town.
- 2. If possible an estimate of the present number of addresses where prostitution takes place. Please report on one large town. If available we would like to have a breakdown into the categories:
 - a. public prostitution (street soliciting, window soliciting);
 - b. nonpublic prostitution (brothels, sex clubs, sex saunas, etc.);
- 3. Are there any recent trends in the numbers or forms of prostitution?

- 4. Statistics on the number of arrests for prostitution (e.g. for street soliciting, running a brothel, living off the avails) since 1960.
- 5. Statistics on the number of convictions since 1960.
- 6. An overview of present sentences for these crimes.
- 7. Are there any prosecution guidelines, or directives for the police on the enforcement of the existing provisions or regulations? Have there been any changes?

 Please specify and report on one large town.
- 8. What are the actual policies for making arrests and for initiating criminal procedures on prostitution? Have there been any recent changes? Please specify and report on one large town.
- 9. If there is a form of licensing, what are the criteria applied?

B.(2) Special questions on law enforcement/social policy

- Please give all information available on any existing policy of licensing or zoning on prostitution.
- 2. Is there a special policy on prostitution by minors?
- 3. To what extent are prostitution and drugs related?

C. Questions on public opinion/policy trends

- Results of all relevant public opinion polls on prostitution (incl. data on having been a customer). Please comment upon any changes.
- Recently have any concerned groups or experts expressed views on prostitution (reports, academic articles, etc.)? Please specify.
- 3. Is there a semi-official opinion about (aspects of) prostitution of feminists/women liberation groups? Any reports, etc?

4. Have there been issued any recent government reports on prostitution or any proposals for new legislation or new policies been made? Is it to be expected that new legislation will be passed or new policies be developed in the near future?





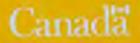


WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION Report # 2

PORNOGRAPHY AND PROSTITUTION IN THE UNITED STATES

by D. Sanslaçon

POLICY, PROGRAMS AND RESEARCH BRANCH RESEARCH AND STATISTICS SECTION



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Pornography and Prostitution in the United States

by
Daniel Sansfaçon
Research and Statistics

August, 1984

The views expressed herein are those of the author and do not necessarily reflect those of the persons who provided the necessary information or those of the Department of Justice



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INTRODUCTION

As part of its initiative in the areas of pornography and prostitution, the Department of Justice appointed a Special Committee in June 1983 to study these issues and report to the Department no later than December 1984. The mandate of this Special Committee included, among others, "(4) to consider, without travelling outside Canada, the experience and attempts to deal with these problems in other countries including the U.S., E.E.C., and selected Commonwealth countries such as Australia and New Zealand".

Whereas the Special Committee was responsible for the public hearings, the analysis of briefs and legal research, the Department's Research and Statistics Section was given the mandate to conduct the socio-legal and empirical research programme. In responding to the above mentioned term of reference, five studies have been commissioned. This one deals with pornography and prostitution in the United States of America.

Clearly, the federal system of the United States is a complicating factor for any study on issues of mixed competence. Both the Federal government and the State governments are empowered to legislate in the area of criminal law, albeit in different respects. It probably can be safely said that the States are most directly responsible for the criminal law and that the Federal government will intervene mainly to unify or give coherence to States' laws or to legislate over matters of national importance where its powers are not preempted by the Constitution (David, 1971; Engdahl, 1974). This means that a study of legislation and enforcement practices in any criminal related matter implies a review of all state laws, and federal laws when applicable, if one is to have a complete picture of the situation in the United States. This was not feasible in the small time period allocated to conduct this review.

Decision was thus made to restrict the focus of the study to the Federal laws and to those of what was perceived as "key" States. At the Federal level, contacts were established with and information obtained from representatives of the U.S. Department of Justice, the Federal Bureau of Investigation, U.S. Post Office, and U.S. Customs. Pressure groups of a national scope such as Morality in Media were also contacted. At the State level, contacts were established and information requested from officials in twelve States. These are: Alabama, Arizona, California, Florida, Georgia, Massachussets, Mississipi, New York, Ohio, Pennsylvania, Texas and Washington. In each of these States a letter was written to the State Attorney asking for information on the State laws on pornography and prostitution, recent significant court interpretations, pending legislation if any, and evidence of public opinion movements with respect to these two issues. Furthermore, within each State, one or two cities were selected and the District Attorney and Police Chief were also sent a letter asking for more local information such as prosecution and conviction statistics, enforcement policies and difficulties, etc. (see Appendix 1 for sample letters). These cities are: Birmingham, Phoenix, Los Angeles and San Francisco, Miami, Atlanta, Boston, Jackson, Buffalo and New York, Cincinnati and Cleveland, Pittsburgh and Philadelphia, Houston, and Seattle. Finally, the National Association of

District Attorneys and the International Association of Chiefs of Police were also contacted to obtain information on prosecution or enforcement policy papers or guidelines which would have been prepared for their respective members. In total, although not every city responded, the return rate was excellent and was sufficient to provide detailed and up to date information.

The following pages will attempt to provide a succinct portrait of the present situation in respect of legislation, enforcement practices, and public debates on pornography and prostitution respectively. Not all States or cities which provided information will be covered since in some cases, the information was either too repetitive or was incomplete. It is our belief however that the information presented is sufficient to give the reader an adequate idea of the state of these questions in the United States.

I - PORNOGRAPHY

The question of pornography, or more accurately obscenity in legal terminology, is not only complex but maybe as ancient as law-making itself. In the case of the United States, one can trace back to the early history of the colonies the preoccupation with obscene utterances and prints. The definition of the obscene has largely changed however, from a religious one in the 16th and 17th centuries to one which is mainly concerned with sexual matters in the present days. Although a full-fledged history of obscenity statutes and court decisions is not to be presented here (the interested reader is referred to Schauer, 1976, and to Sobel, 1979, for historical accounts), the following section is concerned with the development of legislation, at both the State and Federal levels, and of court interpretations on obscenity. In a second section, the Miller test and the subsequent cases having specified some of the vague elements of the offence will be presented. The third and fourth sections will deal with the Federal and States statutes on obscenity respectively. The fifth section will provide some data on enforcement practices in the past five years and on enforcement problems. Finally, the last section will look at present public debates on pornography.

1. Development of Statutes and Jurisprudence on Obscenity

Following on the evolution of the common law in England, the early colonies all "made blasphemy or heresy a crime, by statute, but sexual materials not having an antireligious aspect were left generally untouched" (Schauer, 1976:8). It was not before 1711 that the first statute was enacted which could also be applied to secular materials in the state of Massachussets. The first court decision on obscenity however was not rendered until 1815 in the case of Commonwealth v. Sharpless, where Sharpless was accused and convicted of displaying an indecent picture for profit (Sobel, 1979:7). In 1821, in Commonwealth v. Holmes, the Supreme Judicial Court upheld the conviction of Holmes for his publishing of the "Memoirs of a Woman of Pleasure". In 1842, the first federal statute on obscenity was enacted (1) to prohibit the importation in the United States of indecent and obscene prints etc., and to provide for their destruction by customs authorities (Schauer, op.cit.:10). In the years prior to the Civil War, most States had adopted their own obscenity statutes. Then, in the years following the Civil War, the Federal government enacted a second obscenity statute prohibiting the mailing of obscene material (2). While the cases immediately following this statute were mainly concerned with its constitutionality (it was established in Ex Parte Jackson, 98 U.S. 727 (1877), cited in Schauer, op.cit.:14), the determination of obscenity soon surfaced.

The famous Hicklin (3) test was followed in most of the American court cases until Roth (discussed below). Hicklin, per the name of the accused, determined that obscenity could be decided on the basis of parts of the work and was that which has a tendency "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of

this sort may fall" (in Schauer, op.cit.:7). The American courts however chose to emphasize a peripheral element of the Hicklin case, i.e., the question of assessing obscenity on part or the whole of a work. Furthermore, a large definition of the potential audience was also adopted by the courts and therefore was considered to include -- and in fact mainly referred to -- children. Finally, by the end of the 19th century, the Federal government completed its arsenal of instruments to regulate obscenity by adopting the law prohibiting the interstate transportation of obscene materials (4).

The period 1900-1950 saw the gradual erosion of the Hicklin test and the development of rather more sophisticated concepts, namely the view that the work must be evaluated in its entirety (Halsey v. New York Society for the Suppression of Vice, 234 N.Y.1, 136 N.E. 219 (1922)), that the effect of the work must be assessed on the basis of the "average reasonable adult" rather than on particularly susceptible individuals (United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933)), that the literary value of the work must be considered (see the "Ulysses" case), and that community standards must be taken into account (United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913); all cases cited above are from Schauer, op.cit:27-28).

None of the previous case law had dealt in any depth with the constitutional issues of the First Amendment (protection of the freedom of speech). Roth (Roth v. United States, 354 U.S. 476 (1957)) was to be the leading case for almost twenty years. This test in effect, consolidated the previous developments in court interpretations of obscenity; the test set forth by Justice Brennan thus read:

(..) whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest (in Schauer, op.cit.:37).

Obscenity was considered not to be speech at all and thus not to be protected by the First Amendment. However strict that interpretation might seem, the issue of obscenity was far from resolved. The further years saw a constant narrowing process leading to what Schauer calls "minimal regulation" ultimately "limiting obscenity regulation to hard-core pornography" (op.cit.:41). The clearest case here is Memoirs v. Massachussetts (383 U.S. 413 (1966)), where Justice Brennan, in deciding on Cleland's book Memoirs of a Woman of Pleasure, wrote that in the definition of obscenity:

Three elements must coalesce: (a) the dominant theme of the material taken a a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value (in Schauer, op.cit.:43).

To many observers, including Schauer, this led to minimal intervention in the field of obscenity and to some confusion, particularly because this test

necessitated that all three elements be present and added the expressions "patently offensive" and "without redeeming social value". Miller was to provide the nation's lower courts and enforcement agencies with a much more precise and applicable test (Miller v. California, 413 U.S. 15 (1973); see Appendix 2 for the text of the Miller case). The Miller test, while retaining part of the Roth decision, did away with some of its major impediments, and namely, the "utterly without redeeming social value". The test is the following:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (...); (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (in Schauer, op.cit.:338).

2. The Miller Test: The Average Person, The Community Standard, and The Value of the Work

Three elements were still relatively unclear after Miller which further court decisions were to refine. These are: the average person, the scope of the community whose standards are to be the basis of the assessment, and the value of the work. Each will be briefly discussed.

(a) The Average Person

In contrast to the concept of the "reasonable man" in tort law, the average person in obscenity cases is not the ideal person but the personification of the weaknesses of mankind. Neither is this average person the judge or the jury; yet, one can hardly doubt that the trier of fact or juror do refer to themselves in assessing this average person's complexion. Roth and subsequent cases have taken great care to indicate that this average person neither is the prudish nor the highly callous, the uneducated nor the highly educated, etc. (5). This must not be interpreted to mean a levelling off effect since only what is acceptable to the average person -- and therefore recognizable by this hypothetical person -- would be acceptable to the court. On the contrary, the third part of the test (the social value) opens up the door to expert testimony and thereby to determination of value on the basis of a restricted segment of the population. This point will be dealt with further below.

It was not clear until recently whether the average person test included children. Butler (Butler v. Michigan, 353 U.S. 380 (1957)) could be interpreted as meaning that only the average adult is to be considered. Furthermore, Ginzburg v. United States, 383 U.S. 463 (1966) noted that the inclusion of children in the instructions given to the jury on the average person test was not necessarily appropriate. On the other hand, it seems from

Roth and other cases such as People v. Vanguard Press (192 Misc. 127, N.Y.S.2d 427, 430 (1947)), that as long as the judge's instructions to the jury do not place special emphasis on the young or otherwise particularly vulnerable segments of the population -- or in other words do not give pre-Roth instructions -- all people are to be included in this definition. However, a recent Supreme Court decision (Pinkus v. United States, 436 U.S. 293 (1978)) resolved the issue and determined that the average person test applies to the average adult person and does not include children:

Since this is a federal prosecution under an act of Congress, we elect to take this occasion to make clear that children are not to be included for these purposes as part of the 'community' as that term relates to the 'obscene materials' proscribed by 18 USC s.1461 [mailing obscene or crime inciting matter]. Pinkus v. United States, 436 U.S. 293 (1978) 298

A further precision to the average person test was made by Mr. Justice Brennan in the Mishkin case (Mishkin v. New York, 383 U.S. 502 (1966)) where it was decided that material designed for "deviant" groups appealed to the prurient interest of members of that group and as such satisfied the requirements of the test (6).

(b) The Community Standards

What community is to be considered when evaluating the applicable standards? Who is to make the determination of the standards? Roth elevated this concept to a key issue in the determination of obscenity but did not address the issue of what community meant, i.e, whether it is local, regional or national. The first two cases to deal with this issue were Manual Enterprises v. Day, 370 U.S. 478 (1962) and Jacobellis v. Ohio, 378 U.S. 184 (1964). Both concluded that the community test was of a national scope. The Miller decision reversed this view:

Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact (...). Miller v. California, 413 U.S. 15 (1973) 31-32

That the standard to be applied is a local one -- that needs not be measured by experts (see Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)) -- also applies to Federal statutes (Hamling v. United States, 418 U.S. 87 (1974)). Furthermore, the community standard test is also to be applied, at least by inference from the absence of an opinion to the contrary, to part (b) of the three-prong test enunciated in Miller. In other words, patent offensiveness is to be evaluated on the basis of the local community standards (Schauer, op.cit.:123). This is particularly relevant since the criteria will be whether the work goes beyond the level of tolerance of the community for sexual representations ("beyond customary limits of candor" A.L.I. Model Penal Code,

1962, s. 251.4(1), quoted in Schauer, op.cit.:105).

Finally, with respect to the size of the community, it is left to States to determine, in their obscenity statutes, what it will be or if a size is to be actually determined. (Section 4 will discuss this issue in further details.)

(c) The Value of the Work

Probably one of the most important contributions of Miller has been the replacement of the "utterly without redeeming social value" test established in the Memoirs case by the specification of four social values to be considered in assessing the obscenity of any material. In order to be declared obscene, material has to lack any serious literary, artistic, political, or scientific value. Expert testimony will often be required in determining the value of the work. The community standard test therefore does not apply here since it may be that only a particular segment of the population is apt to recognize the value of a work and/or would likely ever face this work. It also is a question of law more than fact, and as such it is more the judge's than the jury's responsibility to determine whether the work has any serious value. That this is so also allows to avoid expensive trials when the work is considered to be protected because of its value in the first place.

The impacts of Miller, on top of making obscenity statutes workable from a law enforcement perspective, have been twofold. On the one hand, it consacrated the "variable obscenity" doctrine:

Variable obscenity is a principle which holds that the obscenity vel non of given material may be determined only in the context of the method of distribution and the intended and actual audience for the material. (Schauer, op. cit.: 92)

This has meant that material which could otherwise be considered obscene were it available to the entire population, could be left untouched when used for scientific or educational purposes (7). The second impact has been to oblige State laws to specify that only reprehensible sexual conduct is aimed at in their obscenity statutes and to further specify the types of sexual conducts which are not to be described or depicted. By way of examples, Miller suggested that "(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "(b) patently offensive (...) of masturbation, excretory functions, and lewd exhibition of the genitals" (Miller v. United States, at page 24) would constitute sufficiently specific statutes for constitutional purposes. (Section 4 will provide some examples of State statutes which have and have not followed Miller on this issue.)

Two further recent decisions should be mentioned for their importance in different but related issues. In Federal Communications Commission v. Pacifica Foundation, 438 U.S. 1081 (1978), the Supreme Court established that broadcasters — in this case radio — are subject to particular requirements for two reasons: the first is that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive,

indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home" (at page 1093). The second reason is that "broadcasting is uniquely accessible to children, even those too young to read" (id.). In other words, offensive speech which could be declared not obscene in the print media (or even on radio but at hours where so few children could be listening that its negative impacts would be limited), has to be considered unprotected speech when it is presented on the airwaves at hours when children could be listening.

The second case is closely linked to the question of the protection of minors raised in Pacifica. In New York v. Ferber, 458 U.S. 1113 (1982) the Court held that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" (at page 1122) for five reasons. First, the State's interest in protecting children from sexual abuse and exploitation is "of surpassing importance" (at page 1123). Second, the distribution of pornographic films depicting children is directly associated with the sexual abuse of children. Third, the advertising and selling of pornographic material involving children constitute a basis for the production of these materials which are illegal throughout the country. Fourth, the value of permitting live performances or representations of children engaged in sexual activity is minimal. And fifth, classifying child pornography as unprotected material is not inconsistent with prior Supreme Court decisions in the area. The Court also noted that:

The test for child pornography is separate from the obscenity standard enunciated in Miller (...). The Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. (id.:1127)

These decisions, and in particular the latter, constitute important developments in the area of obscenity cases in the US. As will be seen in Section 3, the Bills introduced by the Federal on Child Pornography and to modify the Communications Commission regulations with respect to its powers over offensive broadcasting reflect these recent decisions.

Discussions with officials of the U.S. Department of Justice and with representatives of private pressure groups have indicated that the definition of obscenity and the test determined in Miller and since in force, are broad and applicable enough to permit effective enforcement of the pornography business, provided that Sate laws are drafted accordingly. We will now turn to a closer examination of Federal and State statutes.

3. Federal Obscenity Statutes

There are eight major obscenity statutes in the arsenal of the Federal

government (see Appendix 3 for the texts). These are 18 U.S.C. s.1461 [mailing of obscene material], 18 U.S.C. s. 1462 [use of a common carrier in the interstate transportation of obscene material], 18 U.S.C. s. 1463 [obscene writings on mail material], 18 U.S.C. s. 1464 [obscene utterances on radio], 18 U.S.C. s. 1465 [interstate or international distribution of obscene material], 19 U.S.C. s. 1305 [importation of obscene material], 18 U.S.C. ss. 2251 to 2255 [exploitation of children], and 39 U.S.C. ss 3006-3008, 3010-3011 [Postal Act]. In addition, 26 U.S.C. s. 5723 (d) is a subsection of the Internal Revenue Code prohibiting indecent or immoral pictures or other representations on the packages of cigarettes or other tobacco products, and 47 U.S.C. s. 223 prohibits harassing phone calls and in particular indecent comment is prohibited in interstate or foreign commerce or in the District of Columbia.

The prohibitions in 18 U.S.C. s. 1461 deal with obscenity and abortion, but the obscenity provision would have been applied most often. In fact, according to Schauer (op.cit.:173) of all the statutes on obscenity, this one would have been the most frequently used. The definition of the prohibited material is a real shopping list of all that can be related, directly or indirectly, to obscenity. Paragraph 1 states: "Every obscene, lewd, lascivious, indecent, filthy, or vile (...)". While this statute has been declared constitutional three times by the Supreme Court (8) including in one post-Miller case, some argue that the absence of a definition of obscenity in this and other Federal statutes is questionable, particularly since Miller requested the States to adopt specific definitions (Kennedy and Lefcourt, 1974:22-23, inter alia). Furthermore, the provisions of 39 U.S.C. s. 3006-3008 (detaining obscene material sent in the mail or prior restraint) have been declared unconstitutional on the grounds that they do not provide sufficient protection against prior restraint (Schauer, op.cit.:177). Since they have not been amended, these provisions are unusable. On the other hand, 39 U.S.C. ss. 3008 and 3010 respectively provide that an addressee may refuse mail which, "in his sole discretion, [he] believes to be erotically arousing or sexually provocative" and that sexually oriented advertisement must be so marked on the outside by the sender so that the receiver is warned in advance of the package's content. More importantly, subsection (d) of s. 3010 defines the sexually oriented advertisements so covered:

'Sexually oriented advertisement' means any advertisement that depicts, in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any contact of natural or unnatural sexual intercourse, or any act of sadism or masochism, or any other erotic subject directly related to the foregoing. (Quoted in Kennedy and Lefcourt, op.cit.:24)

Title 18 s. 1461 provides a five year emprisonment term or \$5,000 fine or both for a first offence, and ten year term or \$10,000 fine or both for any subsequent offence.

Similar to 18 U.S.C. s. 1461, 18 U.S.C. s. 1462 is aimed at both obscenity and abortion but the obscenity provision has been most often used. As well, s.1462

presents the same definitional deficiency as s. 1461 with respect to obscenity but has also been declared to be constitutional (9). Section 1462 prohibits the use of common carrier for interstate or foreign transportation of obscene material and s. 1465 the interstate or foreign transportation of such material for purposes of sale or distribution. In addition, 19 U.S.C. s. 1305 is a prohibition of the importation in the United States of any obscene material, albeit only a civil statute whose ultimate goal is the seizure and destruction of the material seized. The penalties attached to s. 1462 are the same as s. 1461 and are of a term of not more than five years or a fine of not more than \$5,000 or both for s. 1465. The constitutionality of 18 U.S.C. s. 1465 and 19 U.S.C. s. 1305 has been upheld in court (10; 11).

18 U.S.C. s. 1464 which prohibits the the broadcasting of "obscene, indecent, or profane language by means of radio communications" is, in and by itself, of limited use as it has to incorporate the Miller requirements and is limited to citizen's band. It includes a punishment of a fine not more than \$10,000 or an imprisonment not more than two years or both. The Federal Communications Commission, under 47 U.S.C. ss. 503 and 510, is allowed to impose a fine (a maximum of \$1,000) for improper language over the air, but this usually is limited to the citizen's band. More important is the power of the Commission to issue and renew or not licenses for operation. (We refer the reader to the already cited case of FCC v. Pacifica Foundation for a landmark judgement in this area.)

The Child Protection Act, 18 U.S.C. ss. 2251 to 2255 provides that children will be protected from exploitation and abuse by pornographic material. This Act was very recently amended (May 21, 1984; see amendments and new reading of the Act in Appendix 4). These amendments do away with the need to prove obscenity, increase the age from sixteen years to eighteen years old, and drastically increase the penalties attached to violation of this Act's provisions. In its preamble Section 2 the Act states:

The Congress finds that -

(1) child pornography has developed into a highly organized, multi-million dollar industry which operates on a nation-wide scale;

(2) thousands of children including large numbers of runaways and homeless youth are exploited in the production and distribution of pornographic materials: and

(3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.

Consequently, the amendments strike out "obscene" whereever the term appears, include "any visual depiction" in lieu of "visual or print medium", and enlarge the definition of "sexually explicit conduct" to include actual or simulated representations (s. 2255 (2) (A)). The penalties are increased from a fine of \$10,000 or imprisonment for 10 years or both to a fine of a maximum of \$100,000 or imprisonment for 10 years or both for a first offence. In the case of an individual having a prior conviction under this Act, the penalties

are increased from a fine of \$15,000 or imprisonment for 15 years or both to a fine of \$200,000 or imprisonment for 15 years or both (s. 2251 (c) and s. 2252 (b)). An additional provision states that organizations violating this section shall be fined not more than \$250,000. Finally, s. 2255 (1) increases the age of a minor to mean "any person under the age of eighteen years".

Finally, a recent Bill has been introduced in Congress and is now before the Senate to amend 18 U.S.C. s. 1464 so as to prohibit "Cable Porn and Dial-A-Porn" (a copy of this Bill is included as Appendix 5). This amendment would include in s. 1464 the following:

- (a) Whoever knowingly utters any obscene language, or distributes any obscene material, by means of radio, television, or cable television communication, shall be fined not more than \$20,000, or imprisoned not more than two years, or both.
- (b) Whoever knowingly utters any indecent or profane language, or distributes any indecent or profane material, by means of radio, television, or cable television communication shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

In this new Act, obscene is define per the Miller test and as such it includes all three prongs of the test. The interesting part however is (B) where the specific sexual conducts not to be uttered are described. These include: "(i) an ultimate sexual act, normal or perverted, actual or simulated, (ii) masturbation, (iii) an excretory function, (iv) a lewd exhibition of a human genital organ, or (v) flagellation, torture, or other violence, indicating a sado-masochistic sexual relationship". Furthermore, in (2), indecent language is defined as: "a depiction or description of (A) a human sexual or excretory organ or function, (B) nudity, (C) an ultimate sexual act, normal or perverted, actual or simulated, (D) masturbation, (E) flagellation, torture, or other violence, indicating a sado-masochistic sexual relationship, which under contemporary community standards for radio or television is presented in a patently offensive way". The most interesting parts of this rather long definition of indecent language are (A), (B), and the expression "community standards for radio or television". The scope of this definition as revealed by (A) and (B) is much broader than the Supreme Court definition of obscenity which had clearly indicated in Roth and repeated in Miller that nudity or the mere presentation or a sexual or even excretory organ was not sufficient to constitute an offence. On the other hand "contemporary community standards for radio or television" remain to be defined: will they be equated with the local community standards? Or will they appeal to larger communities in those cases where the accused program would be a national one presented on a nation-wide basis? Should this Bill go through, one can only imagine the confusion that would ensue, at least until such time as the Supreme Court has made decisions on these issues.

No other changes to the Federal statutes are, to our knowledge, presently being considered. Only one further initiative will presumably be set up in the

coming months following President Reagan's announcement of his intention to appoint a special committee to study the links between pornography and violent sexual crimes. Not much is presently known on this project except that it will likely be a U.S. Department of Justice Commission.

4. State and Local Obscenity Statutes

As previously mentioned two of the fundamental impacts of Miller have been the requirement that the States specify the types of sexual conduct that are not to be depicted, and the abolition of the "utterly without redeeming social value" expression. Upon writing his book in 1976, Schauer could therefore say that "state obscenity laws are now in a constant state of flux" (op.cit.:193). Since most States either had general prohibitions against obscenity or had followed the Roth interpretation and had thus included the "utterly without redeeming social value" criterion, or had included a national community standard criterion rather than a local one, or finally, on the basis of their interpretation of Stanley v. Georgia, 394 U.S. 557 (1969) had simply eliminated obscenity laws as far as it dealt with adults, their statutes were obsolete if not unconstitutional. In the wake of Miller, the amendment machinery was thus set in motion and it was impossible for Schauer to trace a clear picture of the prevailing situation.

More than ten years later, one is now able to draw this picture. In its July and August 1983 editions of the Obscenity Law Bulletin, the National Obscenity Law Center provided a table of the various state statutes, indicating whether they conform or not with the Miller test (and any variations thereby), the geographical area covered by the community standard element, and any particulars of the State statute. This table is included as Appendix 6. As can be seen, a majority of States (43 out of 51) have adopted a statute embodying, with or without modifications, the three elements of the Miller test. A few States have no obscenity statute at all: Alaska, New Mexico (although a section allows for an injunction against the showing of obscene films in outdoor motion picture theatres), South Dakota, Vermont, West Virginia (although by statute the State has empowered its municipalities to enact statutory sections pertaining to obscenity or child pornography), and Wisconsin (statute declared unconstitutional in 1980), are in this group. Other States such as California and Illinois, have statutes which do not follow the Miller test. A few of these statutes will be described in greater detail in the following lines and their differences with the Miller test will be identified whenever appropriate.

(a) New York

New York Penal Law s. 235 defines obscenity as:

Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or

simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

This definition replaced the Roth-like definition in 1974, after the court, in People v. Heller, 1973, 33 N.Y.2d 314, invited the legislature to amend its statute and conform it to the test enunciated in Miller. However, the definition shows some variances from the Miller test. First, the list of sexual behaviours prohibited is more extensive than the examples suggested by the Supreme Court: sexual intercourse, which can presumably be very broadly interpreted, was not in the Supreme Court's list. Similarly, the Supreme Court's definition of objectionable representations was limited to sexual conduct; it is not clear whether sadism and masochism fall within this definition since they are not necessarily sexual conducts. The statute also uses the conjunctive 'and' in the list of serious values whereas the Supreme Court's used 'or'. Another proof problem may arise from the inclusion of the "average person applying contemporary community standards" whereas Miller only proposed contemporary community standards as the basic test for the trier of fact. Finally, the average person test is defined as the average adult, and it has been seen in a previous section that court judgements on this issue diverge, some including all possible individuals in a community, some limiting the test to adults (see section 2(a) above).

The constitutionality of the section has been upheld in various decisions (12). Furthermore, other court decisions have specified some of the elements of the definition. The purpose of the article is, according to People v. Brill, 1975, 82 Misc. 2d 865, 370 N.Y.S. 2d 820, "to avoid invidious exhibition or dissemination of patently offensive sexual material". The question raised above on the inclusion of masochism or sadism has been addressed by People v. Heller 33 N.Y.2d 314 (1973), and the court decided that these are "malum in se" in terms of commercial exploitation, whereas "nudity" and "sex" are malum prohibitum only since they could be described in publications who have serious literary, scientific, artistic or political merit. Community standards have been determined to be statewide in People v. Ventrice, 1978, 96 Misc. 2d 282, 408 N.Y.S.2d 990, and in People v. Kobjack, 1978, 93 Misc.2d, 403 N.Y.S.2d 697 (see also People v. Nitke, 1974). People v. Ventrice also established that obscenity is in the eyes of the beholder and the beholder is bound by contemporary community standards, and that mere nudity or exposure of the genitalia absent any lewdness or lewd act is not obscenity and is protected speech.

Section 235 has a three-degree offence structure. Section 235.05 defines obscenity in the third degree as (1) the promotion or possession with intent to promote, any obscene material; and (2) the production, presentation or

direction of an obscene performance or participation in any obscene performance or part thereof. Section 235.06 defines obscenity in the second degree as the commission of obscenity in s.235.05 by a person having already been convicted of this offence. Section 235.07 defines wholesale promotion or intent to wholesale promote obscene material as first degree obscenity. Section 235.05 is a class A misdemeanor, s. 235.06 a class E felony and s. 235.07 a class D felony (13). In the latter two sections, knowledge of content and intent to promote or promotion must be proved to obtain a conviction of the defendant. In addition, s. 235.10 establishes a presumption of knowledge (see People v. Hey, 1972, 71 Misc.2d 155, 335 N.Y.S.2d 550; and for pandering' see Mishkin v. State of New York, 1966, 86 S.Ct. 958, 383 U.S. 502, 16 L.Ed.2d 56, rehearing denied 86 S.Ct. 1440, 384 U.S. 934, 16 L.Ed.2d 535). It is not a defense that the adults who are distributed the material or to whom the material is promoted have consented, or even paid, to view this material (see Redlich v. Capri Cinema Inc., 1973, 75 Misc.2d 117, 347 N.Y.S.2d 811, and also People v. Shiffrin, 1970, 64 Misc. 2d 612, 315 N.Y.S. 2d 193). Two affirmative defenses are enunciated in s. 235.15; the first recognizes an exemption for law enforcement officials, universities and other persons having scientific, educational, governmental or similar justification for possessing or viewing obscene material. The second is aimed at employees of theatres (stage, spotlight operator, cashier, doorman, etc.) provided these employees do not share in the benefits of their employer other than their employment. Neither of these two defenses is clear. The first has been subject to opposing decisions regarding its constitutionality (14) whereas the second encompasses potentially not only theatre employees but also persons generally associated with live performances theatres, and includes activities not directly asociated with motion picture theatres thereby reducing the scope of the obscenity statute. Two recent decisions however have affirmed the constitutionality of this section on both grounds (15).

Finally, two sets of articles deal with the protection of minors. Sections 235.20, 235.21, and 235.22, protect minors (persons less than seventeen years of age) against the dissemination of indecent material. The dissemination of indecent material to a minor is a class E felony, punishable by a term of imprisonment not less than three years but not exceeding four years. In s. 235.21, the offence of disseminating indecent material to minors reads:

A person is guilty of disseminating indecent materials to minors when:

- 1. With knowledge of its character and content, he sells or loans to a minor for monetary consideration:
- (a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or
- (b) Any book, pamphlet, magazine, printed matter, however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal

descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or

2. Knowing the character and content of a motion picture, show or other presentation which, in whole or part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:

(a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration: or

(b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or

(c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation.

The terms used in this section and defined in s. 235.20 are much broader than the terms used for adult obscenity. This has been held to be constitutional as previous discussion noted. Of primary importance however in this section is the phrase "harmful to minors". The definition of this phrase in s. 235.20 subs.6 rephrases the three elements of the Miller test but adapted to children. This has been indirectly upheld in New York v. Ferber cited above when the Supreme Court held that the New York State statute on sexual performance by a child correctly implied that the Miller test applied to child pornography.

Section 325.22 provides a presumption of knowledge (ss.1) and an affirmative defense in the case where the defendant had no reason to believe that the child was not seventeen years old and over and the child presented to the defendant an official or apparently official document showing that the minor was seventeen or more.

The Article on Sexual Performance by a Child (Penal Law, s. 263) was first enacted in 1977. Whereas the articles in the Obscenity section protect children against the dissemination of indecent material, this one is aimed at the protection of children against their sexual exploitation for pornography purposes. Section 263.05 prohibits the use of a child (less than sixteen years of age) in a sexual performance and the parent or guardian's consent to the child's participation in a sexual performance. This offence is a class C felony. Section 263.10 prohibits the promoting of an obscene sexual performance by a child; this offence is basically similar to s.235.05 with the added aggravating factor that the child is under sixteen years of age. This section is a class D felony. Section 263.15 prohibits the promotion of a sexual performance by a child and also is a class D felony. This section is very broad and, in fact, includes the obscene performance of s. 263.10; it is so broad however that its validity may be questionable (although People v. Ferber upheld it). Section 263.20 provides two afirmative defenses to the

defendant: (1) a reasonable belief that the child was in fact over sixteen, and (2) employees having no financial interest other than their employment in the promotion, distribution, dissemination, etc., of any sexual performance. Finally, s. 263.25 provides that proof of age of a child may be obtained by the already known rules of evidence.

Cities and other local governments may also use other means to control pornography. Civil action may be used against less obtrusive forms of pornography such as topless bars, etc. Licensing authorities such as the New York City Department of Consumer Affairs who is responsible for issuing permits and licenses to most enterprises in the city can, in conjunction with the Building, Fire, Health, Finance or Sanitation Departments of the city, withold or withdraw permits to "inadequate" business premises. On the other hand, there is no classification/censorship system in New York -- and neither is there in all of the United States except for the industry's self-imposed classification system.

The New York statutes on obscenity thus cover the gamut of permissible restrictions. They closely follow the Supreme Court judgements with little variation. This does not seem however to have undercut the development of the market of pornography in this State, and certainly not in New York city, as the section on enforcement will later show.

(b) California

In contrast with the New York statute, the California Penal Code did not conform its definition of obscenity to the Miller test but kept the Memoirs test. Section 311 of the Code reads:

"Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary community standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is a matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

This does not, in itself, makes the California law on obscenity unconstitutional -- in fact, various court decisions have upheld its constitutionality (16) -- but, as mentioned by many, makes the laws almost unenforceable. Within that framework, the Penal Code prohibits, in s. 311.2 (a) any person from sending or bringing into the state for sale or distribution, or from publishing, possessing or printing in the state, with intent to distribute or exhibit, any obscene matter. Contravening to this section constitutes a misdemeanor. In s. 311.5, it is a misdemeanor to advertise or promote the sale or distribution or to solicit the publication or distribution of matter represented by the defendant or held out by him to be obscene. It is also a misdemeanor for a person to engage or participate in. produce, sponsor, present, or exhibit, obscene live conduct to an audience in any public place or place exposed to public view or place which is exposed to the public (s. 311.6). As well, s. 311.7 creates a misdemeanor in the case where a person in any way requires, as a condition of sale, allocation, consignement, etc., that the purchaser or consignee receive obscene matter or threatens to deny a franchise, etc., unless the person accepts obscene matter. Finally, s. 311.8 provides a defense when the act was committed "in aid of legitimate scientific or educational purposes". A second offence to any of the above mentioned articles is automatically treated as a felony (s. 311.9). Upon conviction, the court is entitled to order the destruction of all obscene material which was confiscated.

The penalties are stiffer in cases where the infraction involves the dissemination of obscene material to children or the dissemination of obscene material depicting children. However, the same definitional problems apply and the "utterly without redeeming social value" phrase remains. On the other hand, the fact that the defendant knew that the material depicted persons under the age of 16 engaged in sexual conduct (s. 311 (a) (3)) or that the live conduct depicted persons under the age of 16 engaged in sexual conduct, (s. 311 (g) (3)) have to be taken into consideration when determining whether the representation or conduct goes substantially beyond customary limits of candor.

In that respect, the fact that children were involved will call for different criteria for assessing the obscenity of the material or performance since minors are considered to be more endangered by obscene material. Section 311.2 (b) makes it a felony punishable for up to four years of imprisonment (and/or p fine up to \$50,000) to send or bring into the state for sale or distribution, or to possess, prepare, publish, print with intent to distribute or exhibit for commercial considerations, any obscene matter knowing that such matter depicts a person under the age of eighteen engaging in or simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation.

Section 311.3 makes it an offence punishable by a fine of not more than \$2,000 and/or imprisonment for not more than a year to develop, duplicate, print, or exchange any film, video tape, negative or slide, in which a person under 14 years of age is engaged in sexual conduct. In this section, sexual conduct includes: sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between persons and animals), penetration of the vagina or rectum by any object, masturbation for the purpose of the sexual stimulation of the viewer, sadomasochistic abuse for the purpose of sexual stimulation of the viewer, exhibition of the genitals, pubic or rectal areas, for the purpose of the sexual stimulation of the viewer, and defecation or urination for the iurpose of the sexual stimulation of the viewer. Any subsequent offence to this section or any other offence in the chapter is punishable by imprisonment in a state prison.

Section 311.4 (a) states that a person who, with knowledge that a person is a minor or in the possession of any facts on the basis of which he should know that the person is a minor, hires, employs or uses a minor do or assists the minor in doing any of the acts described in 311.2 (above) is guilty of a misdemeanor. Section 311.4 (b) makes it a felony punishable by imprisonment for up to five years to promote, employ, persuade, use, induce, or coerce a minor under the age of 16, or for the parent or guardian of the minor under 16 to permit the minor, to engage in posing or modeling for purposes of preparing a film, photograph, negative, slide, or live performance involving sexual conduct for commercial purposes. Per s. 311.4 (c) it is a crime punishable for up to eight years in prison to commit the same offence as (b) with a minor under 14 years of age.

The California Penal Code also specifically prohibits the distribution of obscene material which is aimed at minors (under 18 years of age). This material is termed "harmful matter" and is defined as "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary community standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors" (s. 313 (a)). It is a misdemeanor punishable by a fine up to \$2,000 and/or imprisonment in the county jail to distribute, send exhibit, or offer to distribute or exhibit any harmful matter to a minor (s. 313.1 (a)); to cause a minor to be admitted to an exhibition of any harmful matter (s. 313.1 (b)) -- except if the person is the parent or guardian of the minor (s. 313.2 (a)) or if the person is an adult who

represents himself to be the parent or guardian of the minor (s. 313.2 (b)); and to sell or offer to sell any harmful matter to minors in a vending machine located within 500 meters of a school (elementary, junior, or high), or of a public playground. Section 313.3 creates a defense for legitimate scientific or educational purposes.

The California Labour Code (s. 1308 (a) (3)) prohibits the employment of a minor (under 16 years of age) to engage in any obscene, indecent or immoral exhibition or practice; it is a misdemeanor punishable by a fine of not more than \$500 and/or imprisonment for not more than six months to contravene to this section. It also requires (s. 1309.5) a person who sells or distributes films, photos, or magazines which depict a minor under 16 engaging in sexual conduct to determine the name and address of the person from whom such material is obtained; this information shall be kept on confidential records except if and when requested by the police. Failure to keep such records constitutes a misdemeanor.

Two other provisions of the Penal Code should be mentioned. Indecent exposure or procuring or assisting any person to take part in any model artist exhibition which is offensive to decency or which is "adapted to excite to vicious or lewd thoughts or acts" is a misdemeanor (s. 314). As well, the use of obscene language in a telephone conversation which is designed to annoy the other person is a misdemeanor (s. 653 m) and the installation of two-way mirrors in any restroom, locker room, fitting room, or motel room, is a misdemeanor (s. 653n).

California also has a Red Light Abatement Law (Art. 2, Ch. 3, Tit. 1, pt. 4, Penal Code) which authorizes a district attorney to institute a civil proceeding to enjoin and abate any building used for the purpose of illegal gambling, lewdness, assignation, or prostitution (Penal Code s. 11225). In People ex. rel. Van de Kamp v. American Art Enterprises (1983) 33 Cal.3d 328, 138 Cal. Reptr. 740, 656 P.2d 1170, the California Supreme Court held that an action under the Red Light Abatement Law is not one for the abatement of prostitution but one for the abatement of a public nuisance and thus an award may not be awarded against the owner of the property. Following that judgement, the California Legislature amended its Civil Code section 3496 to authorize the court to award costs to a governmental agency in a Red light Abatement action (Stats. 83, ch. 1178).

Furthermore, each city and county in California is an independent entity and may enact their own licensing regulations as long as they do not conflict with state or federal statutes or constitutional law. As is the case in the rest of the United States, there is no classification/censorship board in California.

In February 1984, as in many of the past few legislative sessions, a Bill was introduced in the Legislature to conform the California definition of obscenity with the Miller definition. However, a careful reading of the proposed s. 311 (a) (definition of "obscene matter") shows that the prohibited sexual conducts are not specified as requested in Miller. One thus wonders if this Bill, should it become Law, would not be judged unconstitutional due to its vagueness and/or overbreadth.

(c) Florida

Florida's Code Ch. 847 deals with obscene literature and profanity. Section 847.011 (11) defines obscenity as the following: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest". This definition does not specify the types of sexual conducts whose representation is prohibited nor does it include the third prong of the test on the value of the work. However, the statute has been held to be constitutional in various court decisions (17). Furthermore, the Florida Supreme Court prospectively adopted the Miller test and in particular the "value of the work" element (see Rhodes v. State, 283 So.2d 351 (1973)). As to the issue of community standards, it has been decided in Davison v. State, 288 So.2d 483 (1973) that they are local rather than state-wide standards; in fact, they do not even have to apply to a whole county.

Section 847.011 (1) (a) of the Florida Code makes it a misdemeanor in the first degree almost all possible actions of selling, distributing, etc., any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic, book, magazine, periodical, etc., (including writing, paper, picture, figure, image, phonograph record, etc.), of manufacturing, preparing, etc. such material, of uttering, writing, printing, publishing, etc. such material, or of hiring, employing, using, or aiding in hiring, etc., or permitting any person to commit any of these acts. The possession, custody or control of any obscene, lewd, etc., material or representation, without intent to sell, distribute, etc., constitutes a misdemeanor to the second degree (s. 847.011 (2)). It is a misdemeanor of the third degree to require that a purchaser or consignee receive for resale any obscene, lewd, etc., material (s. 847.011 (3)). And it is a misdemeanor of the third degree to promote, conduct, perform, or participate in obscene, lewd, etc., show, exhibition, or performance by a live person before an audience. Upon arrest of a person charged under s. 847.011, all books, etc. shall be seized (847.03) and upon conviction, the court is entitled to conficate and order the destruction of the said material (s. 847.02).

Section 847.04 makes it a misdemeanor of the second degree to use profane, indecent or vulgar language in any public place. Section 847.06 makes it a misdemeanor to the first degree to transport into the state or within the state for the purpose of sale or distribution any obscene, lewd, etc., material. Finally, the distribution of any obscene material is a misdemeanor to the first degree (s. 847.07 (4)), and the wholesale promotion (defined as the manufacturing, issuing, selling, etc., for purposes of resale or distribution) constitutes a felony of the third degree. The interesting part of 847.02 is ss. 2 which uses the Memoirs test of obscenity:

Considered as a whole and applying community standards, material is obscene if:
(a) Its predominant appeal is to prurient interest; that is, a shameful or morbid interest in sex, nudity or excretion;
(b) It is utterly without redeeming social value;

and (c) In addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

Sections 847.012 and 847.013 respectively prohibit the sale or other distribution of harmful materials to minors (under 17 years of age), and the exposition of minors to harmful motion pictures, exhibitions, shows, presentations, or representations. Harmful material is defined as:

"Harmful to juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

1. Predominantly appeals to the prurient, shameful, or morbid interest of juveniles, and

2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and

3. Is utterly without redeeming social importance for juveniles.

Nudity includes the showing of male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering below the top of the nipple, or the showing of covered male genitals in a discernible turgid state. Sexual conduct includes masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or female breast.

The violation of s. 847.012 constitutes a felony of the third degree, whereas it is a misdemeanor in the first degree to violate s. 847.013.

These three examples suffice to demonstrate that State statutes on obscenity vary widely, even ten years after the Miller test. (Appendices 7 to 12 provide additional examples of State statutes on obscenity, and Appendices 13, 14 and 15 provide examples of City Ordinances and related case law when appropriate.) Even in those cases where the test has been the basis for amending previous statutes, the scope and breadth of the prohibitions, especially with respect to the specification of the sexual conducts whose representation is forbidden, vary from one state to the next. The boundaries of the community to be considered in assessing obscenity vel non also vary: in some states they are state-wide and in others they are limited to counties, cities or to this area where the infraction was committed. Some states permit their cities or counties to enact regulations for the licensing of obscenity and others preempt this by legislation. The prohibition of child pornography and of the dissemination of pornographhy to minors also vary considerably from one state to the other. Not only does the maximum age varies, but the extent of the behaviours which are prohibited to be seen by the young as well as the presence of affirmative defenses for parents or guardians.

One of the effects of this situation is to give credence to the claim made by some civil libertarians as well as by some pornographers and womens' groups alike that one can hardly know what is protected speech and what is not from one state to the other, if not from one city to the next within the same state. On the other hand, this diversity may also be seen as a reflection of the very diversity of the United States themselves. Certainly, this was recognized by the Supreme Court when it reached its Miller decision. Another effect of this situation, which is much more important to this study, is the extreme diversity of law enforcement policies and practices. It is to this question that the next section is devoted.

5. Enforcement Practices and Problems

The most common form of child pornography is the magazine that caters to both straight and homosexual pedophiles. Child porn magazines depict children of either sex in a variety of different poses and positions. The children in such magazines range from infants to adolescents (...). Films, while not as common as magazines, are usually more sexually graphic. (...) There are "sporting clubs" in which parents swap pictures of their children with other parents and adults. (Holmes, R.N., 1984:42)

The data indicate that the major type of pornography involves photographs of boys and/or girls. Items such as movies or videotapes have a low percentage of discovery. Since the data show that much of the child pornography is related to personal consumption, the high frequency of photographs is not surprising. (D'Agostino, R.B., et.al., 1984:38)

Both these quotations come from the same issue of the same magazine: The Police Chief (February, 1984). One could have hardly hope for more evident contradictions. What is child pornography? Where is it? In recent years, most States have adopted stiffer penalties against the sexual exploitation of children in pornography, either as part of their existing obscenity law or as a new statute. The new Federal legislation on the Sexual Exploitation of Children already described in section 2 includes very harsh minimum penalties (e.g., \$200,000 fine and/or 10 years in prison) for the dissemination, production, etc., of photographs showing children in sexual contexts (it is not required in this law to prove obscenity). The problem has been said to be of significant dimensions, particularly in certain metropolitain areas of the country. In April 1982, the U.S. General Accounting Office noted that "(...) the number of children involved in pornography could not be determined. In this case, only State officials indicated that the problem had increased over the past five years; city and police officials generally believed the problem had remained about the same." (18).

The purpose of this section of the study is not to attempt to document the extent of pornography or child pornography in the United States. Such an attempt would be doomed to produce insignificant results. It is significant to know however that although the definition of pornography is relative, and although little is known about the characteristics of the business, pornography is much talked about, to the point of becoming a social issue (this will be addressed in the next section). Law enforcement agencies at both the Federal and State level appear, overall, to keep low profile policies with respect to adult pornography, but to be more active on the child pornography side.

According to the data presented in a report prepared by Morality in Media (19) the estimated gross revenues of the pornographic industry in the U.S. would be at around 7 billion a year. There would be between 15,00 and 20,000 "adult" bookstores in the U.S., 400 "skin" or "porno" magazines, 750 pornographic movie houses, 3,500 different porno films now available, and some 650,000 subscribers to the Playboy cable porn TV channel. It also is claimed that organized crime controls a major portion of the pornography business (as much as 90% according to some sources). How these figures have been obtained and what their significance is remain to be discussed.

At the Federal level, the agencies responsible for the enforcement of the laws are the Federal Bureau of Investigation (FBI), the U.S. Postal Inspection Service, and the U.S. Customs. However, the same report (Morality in Media, 1984:9) states that "[t]hese agencies apparently threw in the towel on obscenity investigations because most U.S. Attorneys would not prosecute any obscenity cases other than child pornography". In fiscal year 1978-9 the Department of Justice obtained the convictions of 24 defendants on obscenity charges, 13 of which were distributors of child pornography. In 1979-80 they would have successfully prosecuted 20 defendants, 8 of which were distributors of child pornography, and in 1980-81, 18 defendants were convicted, 9 of which for child pornography. The activities of the FBI are not documented; they are thought to be minimal as far as obscenity goes. The Digest of the U.S. Postal Inspection Service for fiscal years 1979, 1980 and 1981 showed 9, 14, and 26 convictions for child pornography respectively in all of the United States, and no conviction for mailing obscenity. Similarly, the number of seizures by Customs under the civil law dropped from 15,020 in 1975 to 1,580 in 1980. The priorities of the FBI in respect to obscenity are: organized crime involvement, large scale distributors, and child pornography. These pririties presumably reflect those of the U.S. Department of Justice Attorneys who are responsible for initiating prosecutions under the Federal laws.

At the State level, some of the cities that were contacted provided us with statistics on the numbers of arrests. District attorneys rarely could provide data on conviction rates however since their district may include more than one city and since, probably similar to Canada, their record keeping system is not all that useful for statistical purposes. The following are some examples of local enforcement of obscenity provisions. (Only those where some explanation of the enforcement policies were provided are included here.)

(a) Phoenix

The city of Phoenix Police Department is responsible for the enforcement of the State and city statutes. The city ordinance on amusement governs the licensing of these businesses. As such, it is jointly enforced by the city police and by the city Treasurer's Office. Businesses are inspected periodically and charged with any violation found. Furthermore, the city ordinance on the zoning of adult bookstores, adult live entertainment establishments, and adult theatres (see Appendix 13) delineates where these businesses may be located within the city. The City Zoning Department maintains an enforcement branch to supervise the application of this ordinance. As well, the police department maintains a Vice Enforcement Unit as part of the Special Investigations Bureau to investigate cases of violations of the state obscenity statutes. The following statistics only reflect the enforcement of adult retail businesses (wholesalers, distributors, etc., are not included). In 1979, there were 20 adult businesses in the city. Nine obscenity cases were submitted to the District Attorney for prosecution involving different retailers. In 1980 and 1981, enforcement was directed at wholesalers and large pornography distribution businesses; as a result of these investigations, there would be no more such businesses in the city. In 1982, two of the seventeen retailers then operating were charged. In 1983, 12 of the 20 businesses were charged and to date, in 1984, one of the 21 stores in operation has been charged. Overall, the City Police estimate that there is one adult retail outlet for every 37,500 residents in the metropolitain area of Phoenix, generating yearly revenues of approximately 2 million (this excludes live performances).

(b) Houston

The City of Houston Police Department has a fifty-four officers Vice Division which includes a Pornography Squad comprising eight officers. This pornography squad is responsible for the investigation of all pornography cases. Up to recently, the policy was to "get at" clerks of bookstores and theatres in the hope of reaching the owner. In the absence of much success, the efforts have been refocused directly to the owners of the establishments. There are primarily two ways to "make an obscenity case": the first is through undercover operations (entering the shop, looking at the material and, if need be, buying some of it). In the case where some material is suspected of being obscene, the officer will then have it shown to the Assistant District Attorney or to the District Atorney's Committee on Obscenity. If the material is deemed obscene, the officer then obtains a warrant and arranges for the arrest of the clerk. The second method is through the use of the confiscation process. This method is used particularly in the case of films displayed for a fee and not those sold "over the counter". After having carefully noted the content of a film, the officer obtains a warrant for seizure and brings the material in front of the Magistrate who issued the warrant for determination of obscenity.

Statistics obtained from the Houston police department show the following level of activity:

	YEAR					
	1980	1981	1982	1983	1984(to date)	
promotion of obscenity	148	192	227	131	38	
promotion of obscene device	7	5	23	12	11	
sale to a minor	-	2	-	4105	-	
wholesale promotion	-	2	1	4	com .	

As to the prosecution of the cases, the bureau of the District Attorney claims to have a conviction rate over 90%; it is not known however how many cases are actually prosecuted and what are the characteristics of the 'successfull' cases.

(c) Cincinnati

The city of Cincinnati presents an interesting peculiarity, especially for a large northern city: it is, to our knowledge, the only one in this area to claim that it has done away with pornography. And the statistics presented to us would certainly tend to support that claim. In effect, there were 2 arrests in 1979, 6 in 1980, none in each of 1981 and 1982, and 1 in 1983. Enforcement efforts, we were told, have resulted in the total elimination of the public display, sale, or dissemination of pornography in Cincinnati. At present, there would be no adult bookstore, no X-rated movie house, and no massage parlor in this city. We are also told that the well known magazine Hustler is no longer sold in the entire Hamilton County since 1976. The most useful tool in the "battle against pornography", has been, according to the police, civil actions; indeed, one of the effects of a successfull civil action in these cases is that the location where the business was taking place is to remain closed for one year and not to be used for any purpose. Similarly, the police and attorney's office have made much use of community groups to pressure the business community but also to act as witnesses and jurors. Finally, the Liquors Laws and Regulations of the State of Ohio have been greatly used against convenience stores who were selling obscene magazines; 32 "objectionable" magazines were removed from all bookstores in Hamilton County as a result of this hard policy.

(d) Seattle

The Seattle Police claim that, due to the inadequacy of the State law on obscenity, not much has been done over the past years. In effect, enforcement statistics reflect this policy as a countinuous decline in the number of arrests and citation is evident: in 1979 there were 1,335 arrests and citations, 1096 in 1980, 675 in 1981, 107 in 1982, and 39 in 1983. Given that the law has not changed since 1979, these figures are somewhat amazing. On the other hand, it is expected that the new law on child pornography will be used more extensively.

Enforcement of pornography is said to be difficult in New York for a variety of reasons. Police will take action only when a complaint is received. Prosecutors are hesitant to bring obscenity cases to court since the "prevailing community standards" test applies to the whole city of New York, which means that an unchallenged assessment of these standards is almost impossible to attain. Similarly, judges have held that since pornography is so widely available in New York and so few complaints are received, that the community not only tolerates but also supports the pornography by their purchases. As well, defense attorneys have successfully argued in some cases that the material is so repulsive that it lacks all "appeal" and, therefore, can not be obscene.

Enforcement in the area of pornography is done by the Public Morals Division of the New York city police. The tactic most often used in proactive enforcement is the undercover agent who buys pornographic material. Their major targets are child pornography and deviant forms of sexual behaviour such as bestiality, group sex, or sadomasochism. Police officials indicate that the pornography business in New York is extremely large but has taken new forms in recent years. The book and film businesses in Times Square are down considerably in numbers, from 30 in 1977 to 17 in 1983, and movie houses have gone from 29 in 1978 to 15 today. Part of the explanation would lie in saturation and overextension. However, the fact that X-rated video tapes have virtually taken over the market as they are cheap and readily available in legitimate shops for home consumption probably accounts for much of the reason. The number of arrests for obscenity made by the New York police over a five years period is: 298 in 1979, 486 in 1980, 443 in 1981, 463 in 1982, and 189 in 1983. Over the same period, the Distric Attorney's office has secured 18 convictions for promoting obscenity and 10 of the defendants have been sentenced to terms of incarceration.

As can be seen from the limited information presented above, the enforcement situation varies even more than the State laws. Overall, pornography is not considered to be a priority for police or prosecuting attorneys, except where it involves children or the organized crime. This has fuelled some of the public outcry recently heard in many parts of the country.

6. Public Debates

The extent and nature of the pornography business may not be known very well if at all; the enforcement of obscenity laws may not be a police priority, at least in comparison to other criminal activity; but pressure groups seem to have mounted a relatively large public outcry movement which may surpass the extent of the problem itself. In the past ten years, and particularly since the report of the 1970 Presidential Commission (20), at least two types of groups have developed a critical view on pornography and have organized protest and lobbying. The womens' groups have started to make an issue of pornography in the mid-seventies. It would be incorrect to present womens' groups as a monolithic bloc and for that reason, this section does not intend to provide a representative view of these groups' positions on pornography. What is most often heard however is that pornography is a form of hatred literature against women that breaches their rights as equal human beings

(21). Pornography, it is said, objectifies womens' bodies and thereby creates an environment where they are looked upon as men's toys. The most recent initiative along these lines is the pressure on cities to enact ordinances on obscenity as a violation of womens' civil rights (22). The first of these, the Minneapolis city ordinance (included as Appendix 16) stated that:

The Council finds that pornography is central in creating and maintaining the civil inequality of the sexes. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. (s.139.10 (a) (1))

The proposed ordinance would have created a cause of action for women on the basis of discrimination by trafficking in pornography, coercion into pornographic performances, having pornography forced on oneself, and assault or physical attack due to pornography. In a letter sent to the municipal council, McKinnon and Dworkin, the authors of the proposed ordinance, argued that in this civil ordinance "this is the first time the legal concept of the injury is the same as the real social injury pornography does" (23). Contrary to the obscenity laws which deal with an "idea" of the normal or abnormal, the good or bad, the moral or immoral, pornography, they say, is real exploitation, the concrete subordination of women (24).

That this ordinance has not become law is not the central issue here. A similar, albeit more specific and limited ordinance has recently been submitted to the Indianapolis municipal council. What is possibly happening then is the creation of a movement, concerted or not, where womens' groups in different cities throughout the U.S. will be pressing their local councils to consider a similar avenue to fight pornography. Ultimately one will pass and will, sooner or later, reach the U.S. Supreme Court, where a new definition of pornography could be landed.

The second type of groups is totally different and although it is not rare to see both groups attend the same meeting on pornography, their fundamental principles and aims differ sharply. Morality in Media in New York, and Citizens for Decency through Law, in Phoenix, are both, although to varying degrees, religious-based organizations. Both organizations were founded by two of the members of the 1970 Presidential Commission on Obscenity and Pornography. They are respectively father M. Hill, and C.H. Keating Jr. who wrote dissent reports following the release of the official report of the Commission. Morality in Media evolved from a private organization named "Operation Yorkville" which was created in 1962. The organization is inter-denominational and aims at cleaning the american society of its evils, including pornography. Citizens for Decency through Law is a non-denominational organization founded in 1957. Its aim is to seek strict enforcement of the obscenity laws so that the country will get rid of "smut merchants". Both organizations have strong legal capabilities and submit briefs as "amicus curiae" to the courts as well as provide counsel and assistance to police forces and local and district attorneys throughout the United States. They have both been involved in such cases as Miller v. California, Flint v. Ohio, New York v. Ferber. They also help the State legislatures redefine their statutes according to the Miller principles, and

press State and Federal representatives to act on the pornography issue. Their ultimate goal is to restore the stability of the family based on mutual respect, affection, and obedience to legal and moral principles.

A last organization also pushing for legal change should be mentioned. The National Coalition on Television Violence is a private organization concerned with the amount of violence shown on TV and its deleterious effects on children. This organization is endorsed by such well known researchers as L. Eron, W. Glasser, K. Menninger, R. Blanchard, etc. as well as by groups such as Women against Violence against Women, the American Association of University Women, etc. The Coalition publishes a newsletter where ratings of the amount of violence shown on TV are documented. They recently proposed that the U.S. Congress enacts a Bill to amend the Communications Act so that response time would be given free of charge by the TV networks to responsible persons to educate the public on the effects of violence after a network has presented a violent programme.

It is not clear whether pornography is an issue of concern to the average American. No national surveys on citizens' attitudes towards pornography are known to us. However, the above mentioned groups have become so very visible in the past five or six years that one of their potential impacts may well be to foster public concern over pornography.

II- PROSTITUTION

On the surface, prostitution does not present the same amount of difficulties in American law and practice. Fifty States outlaw prostitution and its related activities and only one, Nevada, permits a regulated form of prostitution in certain parts of the State. The issue is no less problematic than pornography however. Recent debates on this phenomenon have pointed to the unequal aspect of these laws and their enforcement since women prostitutes are the prime target for the law, leaving the other prostitutes and even more so the customers of prostitutes almost untouched. It also is argued that methods of enforcing prostitution laws constitute invasions of the privacy of these people and deny them their fundamental rights to free choice. More theoretical arguments see prostitution as an example of a sexist and patriarcal society where sex is a commodity to be bought and sold.

In any event, laws on prostitution are relatively more recent than laws on obscenity. It was not before the turn of the century that prostitution was suddenly declared to be a social evil and a problem which had to be responded to by way of the criminal laws of society. Part of the "crisis" was the fear of venereal diseases which were associated with prostitution. Another issue was that of the white slave traffic which caused the Society of Nations to adopt an International Agreement on it in the early years of this century (1). It is probable that the movements for the emancipation of women of the early century also contributed, however unintentionally, to this climate of fear which degenerated in more repressive measures (James, 1977).

In the following sections, prostitution will be described in much the same way as pornography was in the previous chapter. The first section will deal with the Federal laws on prostitution. The second section will concentrate on State and local statutes and the third on enforcement pratices and policies. Finally, the fourth section will deal with present debates on the issue.

1. Federal Laws on Prostitution

The role of the Federal government in the area of prostitution is similar to, albeit somewhat more limited, than the role it plays with respect to pornography. The government may enact legislation in three areas: to protect servicemen and the army from the threat of prostitution activities (e.g., the Draft Act of 1917 when, upon entering the First World War, the United States government felt a responsibility to protect its draftees from the risks of prostitution and included in the law a section prohibiting prostitution within a prescribed area around military and naval installations), to impede aliens from entering the country for purposes of prostitution (the Immigration and Naturalization Act), and to repress the interstate transportation of prostitutes or interstate operation of prostitution businesses (18 U.S.C. ss. 2421 to 2424). Furthermore, the Federal Government is responsible for signing International Treaties and as such may elect to be part of treaties or conventions on the repression of prostitution; in that respect, the Government

has signed the International Agreement for the Suppression of the White Slave Traffic in 1906 (1). The major tool however is the Code section prohibiting interstate transportation and as such it will now be described in more detail.

The Mann Act, as it usually is described, is the U.S. equivalent of the International Agreement on the Suppression of the White Slave traffic (2). It was first adopted in 1910 to stop the traffic in women (3). Section 2421 of the Act provides that "Whoever knowingly transports in interstate ot foreign commerce, (...) any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral purpose" or whoever procures any means or form of transportation for the above purposes, "Shall be fined not more than \$5,000 or imprisoned not more than five years, or both". The Act has been used against pimps (4), and in cases where a woman was transported to become a "madam" in other countries or states (5). However, the language of the act is so broad that convictions under this Act have been obtained in cases where the persons took a mistress in a trip with them (6), the persons crossed a state border with a woman to contract a marriage (7) or took a secretary along in part for sexual purposes (8).

Constitutionality of this Act has been unpheld in many cases, and under many different circumstances. For instance, it has been held that this statute is sexually neutral in that it can be violated by both males and females and the fact that the class of possible victims is limited to females has not been considered as a breach of the equal protection amendment (United States v. Garrett, 521 F.2d 444 (1975), United States v. Green, 554 F.2d 372 (1977)). Furthermore the law has been held not to be unconstitutionally vague (United States v. Ceasar, 368 F Supp. 328, affd without op., 519 F.2d 1405 (1973)).

Debauchery has been defined as indulgence in sexual intercourse with lust being sole motivation (Cleveland v. United States, 329 U.S. 14 (1946)), as leading a chaste woman into unchastity, fornication and adultery being species of the term (Johnson v. United States, 215 F. 679, (1914)), as exposing a woman to such influences as will naturally and inevitably so corrupt her mind and character as to lead her to act of sexual immorality (Van Pelt v. United States, 240 F. 346 (1917)), as all sexual immorality, whether for hire or cohabitation (United States v. Marks, 274 F.2d 15 (1959)), or as seduction from virtue to a deprived state (Unites States v. McClung, 187 F. Supp. 254 (1960)). It has also been held that the knowledge or consent of the woman are not necessary nor do they constitute a defense (Qualls v. United States, 149 F.2d 891 (1945), Hart v. United States, 11 F.2d 499 (1926), Hattaway v. United States, 399 F.2d 431 (1968), United States v. Pelton, 578 F.2d 701 (1978)). On the other hand, the prosecution must prove that the defendant's motive was prostitution, debauchery, or other immoral purpose or practice (United States v. Harris, 480 F.2d 601, cert. denied 414 U.S. 977 (1973)), and the fact that a woman consented can be interpreted as conspiracy on her part to violate s.2421 (Corbett v. United States, 299 F. 27 (1924)).

Section 2422 prohibits the coercion or enticement of any female to go from one state to another or to another country for purposes of prostitution,

debauchery or any other immoral purpose. Violation of this sectio is punishable by a fine not exceeding \$5,000 and/or imprisonment not exceeding five years.

Section 2423 prohibits the transportation or financing, in part or in whole the transportation of a minor in interstate or foreign commerce with the intent that such a minor engage in prostitution, or prohibited sexual conduct for commercial purposes. The minor is any person under the age of eighteen years, and the prohibited sexual conduct is defined as sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal whether between persons of the same or opposite sexes), bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals or pubic area. In this case, the act of furnishing money to buy the ticket for interstate transportation is sufficient to prove violation (United States v. Austrew, 202 F. Supp. 816, 317 F.2d 926 (1962)). Violation of this section involves a penalty of a fine not more than \$10,000 and/or imprisonment not more than 10 years.

Finally, section 2424 requires anyone who keeps, maintains, controls, etc., any alien woman for the purposes of prostitution or any other immoral purposes to notify the Commissioner of Immigration and Naturalization. Failure to do so implies a fine no more than \$2,000 and/or imprisonment no more than two years.

We have no statistics with respect to the enforcement of these Federal laws, and neither were we able to obtain any further precisions regarding their enforceability.

2. State and Local Statutes on Prostitution

As already mentioned, all States but one totally prohibit prostitution in one way or another. Thirty-eight prohibit the exchange of sex for money and forty-four and the District of Columbia prohibit solicitation. Some States prohibit solicitation for the purposes of prostitution, even though prostitution per se is not illegal and conversely, in some States, the simple fact of being a prostitute is illegal. Related laws on vagrancy, fornication, or adultery, may also be used in some States to harass prostitutes (9). However, there is a clear trend toward the abolition of laws on fornication (private, noncommercial, consensual intercourse between adults) and on sodomy (oral-genital or anal-genital between consensual adults) (10). (Included as Appendix 17 is a table indicating the particulars of each State law on prostitution).

State statutes on prostitution generally outlaw the actual act of prostitution; doing otherwise would create extreme enforcement difficulties because conviction would then require the testimony of a participant in the sex act. As has been said by a trial judge, if there is "no bedroom affair, no touching of the bodies, no money paid, and no sexual activity" prostitution has not been committed (Holloway v. City of Birmingham, 55 Ala. App. 568, 317 So.2d 535 (1975)). All States also prohibit prostitution-related activities such as pandering (arranging for or inducing someone into becoming a prostitute), pimping (sharing the earnings of a prostitute and procuring customers), and other businesses such as promoting prostitution. Red Light Abatement Acts and City Ordinances allow civil proceedings to be brought against the premises used for prostitution and prohibit massage parlours. Finally, many States have included sections to prohibit the activities of prospective customers (11).

The next paragraphs will describe some of the State laws on prostitution in greater detail before we turn to a discussion of the general constitutional issues.

(a) New York

The New York Penal Law prohibits prostitution (s.230.00), patronizing a prostitute (ss. 230.02, 230.03, 230.04, 230.05, 230.06, 230.07, 230.10), promoting prostitution (ss. 230.15, 230.20, 230.25, 230.30, 230.32, and 230.35), and permitting prostitution (s. 230.40).

Section 230.00 states that "A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." This offence is a class B misdemeanor (see footnote 13, chapter I for the classification of misdemeanors and felonies). Prior to the 1967 amendments to the Criminal Code, prostitution per se was not an offense but a form of vagrancy which was punishable by emprisonment for up to six months. The 1967 amendments made prostitution in itself a violation although of a non criminal type; it carried a penalty of a maximum of 15 days of imprisonment. Various agencies from the criminal justice area noting the inadequacy of this treatment in terms of deterrence, the section was further

amended in 1969 to remain as it now is, i.e., a criminal offense punishable by up to three months in jail. This section has been held to be constitutional on various grounds (12). In People v. Costello (13) the purpose of this section has been said to be the prohibition of the commercial exploitation of sexual gratification. The term sexual conduct has been interpreted by some to mean that which is defined in Penal Law section 235.20 (14) and in a later case, it has been argued that this was improper since this definition was intended to apply only to the dissemination of obscene material to minors (15).

Section 232.02 states that a person patronizes a prostitute when he pays a fee for sexual conduct engaged in, whether directly to the prostitute or to a third person, or when he solicits for the purposes of engaging in sexual conduct for a fee. In People v. Bronski, 351 N.Y.S.2d 73 (1973), it was decided that the infraction of "patronizing a prostitute" is committed also when the patron solicits a person who is avowedly not a prostitute. There is a four-degree structure to this offense. The fourth degree (s. 230.03) makes it a class B misdemeanor to patronize a prostitute. This is the most common situation since it covers the patronizing of an adult prostitute by an adult customer. A class A misdemeanor occurs (s. 230.04) when a person over twenty-one years of age patronizes a prostitute who is less than seventeen years old. Section 230.05 makes it a class E felony for a person over eighteen years of age to patronize a prostitute less than fourteen years of age. Finally, the last degree of this hierarchy is to patronize a prostitute who is less than eleven years old; this is a class D felony. Implicit in the last three sections is the premise that prostitutes under 17 years are victims rather than willing participants. Section 230.07 creates a defense for the patron when he had no reasonable grounds to believe that the person was less than the specified age. Given that this is not an affirmative defense, it is the responsibility of the People to disprove beyond reasonable doubt such defense. Finally, section 230.10 makes it clear that the sex of either person, i.e., the prostitute or the patron, is not a consideration in these offences.

A person advances prostitution when, other than as a prostitute or patron, he causes or aids a person to engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution, operates or assists in the operation of houses of prostitution, or in any other way facilitates prostitution (s. 230.15 (1)). A person profits from prostitution when he receives compensation (money or other property) pursuant to an agreement or understanding with a person who engages in prostitution (s. 230.15 (2)). This offence also has a four-degree structure. Section 230.20 creates a class A misdemeanor for advancing or profiting from prostitution. Section 230.25 makes it a class D felony to either manage, supervise, control or own a house of prostitution or a prostitution business involving two or more prostitutes, or to advance or profit from the prostitution of a person less than 19 years old. It is a class C felony to either advance prostitution by compelling by force or coercing a person to engage in prostitution, or to advance or profit from the prostitution of a person less than 16 years old. Finally, section 230.32 makes it a class B felony to advance or profit from the prostitution of person less than eleven years of age. Section 230.35 states that the person less than seventeen whose prostitution is being promoted is not an accomplice. A further section of the

Penal Law dealing with prostitution makes it a class B misdemeanor to permit the use of premises for prostitution purposes (s. 230.40). Finally, in the wake of the 1976 Democratic National Convention in New York City, section 240.37 was added to the arsenal of useable laws to curb prostitution. This section makes it a class B misdemeanor to wander in public places and repeatedly stop, or engage conversation with passers-by, or motorists for purposes of prostitution, or for purposes of promoting prostitution. This section has been declared constitution in People v. Smith, 44 N.Y.2d 613, 407 N.Y.S.2d 462, 378 N.E.2d 1032.

As was the case for pornography, various municipal departments can also be used to control prostitution; as such they will not be discussed any further here.

(b)California

Section 647 (b) of the California Code makes it a misdemeanor to "solicit or engage in any act of prostitution. (...) 'prostitution' includes any lewd act between persons for money or other consideration". Leffel v. Municipal Court, 54 CA3d 569, 126 Cal Rptr. 773 (1976) has held that this section included prostitutes as well as the patrons. Solicitation has to be more than mere nodding to a pasing stranger, waving to a passing vehicle, or standing on a street corner in a mini skirt; on the other hand, it is not necessarily limited to offers specifying prices and services or even to verbal offers (People v. Superior Court (Hartway), 138 Cal. Rptr. 66 (1977)). Furthermore, solicitation is not limited to public places; it can take place in a private place and still constitute a violation of this section (People v. Fitzgerald, 165 Cla. Rptr. 271 (1979), People v. Love, 168 Cal. Rptr. 591, (1980)).

Section 647 also makes it a misdemeanor to engage in lewd or dissolute conduct in a public place (a), to loiter in public toilets for the purpose of engaging in lewd or lascivious acts (d), or to loiter or wander on the streets without apparent reason or business and refuse to identify oneself when requested to by a peace officer (e).

Section 266 (a) to (j) deal with the taking or abducting of a person for prostitution purposes and with pimping and pandering. Section 266 (h) provides that any person who lives or derives support or maintenance in whole or part from a prostitute or prostitution related activities is guilty of a felony and punishable by imprisonment for up to 6 years or for up to eight years if the person engaged in prostitution is under 16 years of age. Section 266 (i) provides that any person who (a) procures, (b) by promises, threats, etc., induces another person into engaging in prostitution, (c) procures someone as an inmate in a house of prostitution, (d) induces someone to become an inmate in a house of prostitution, (e) by fraud, duress, abuse, entices someone to become a prostitute in any place in which prostitution is encouraged, and (f) receives money or other value or thing for procuring a person for purposes of prostitution, is guilty of a felony punishable by imrpisonment for up to 6 years, or if the person procured is less than 16 years old, for up to 8 years.

Section 266 deals with the enticement of a female under 18 years of age for purposes of prostitution. It reads:

Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of 18 years, into an house of ill-fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement; and every person who, by false pretenses, (...) procures any female to have illicit carnal connection with any man, is punishable by imprisonment (...) not exceeding one year, or by a fine not exceeding two thousand dollars (\$2,000), or by both (...).

One wonders what the impact of the requirement that the woman be of previous chaste character has on this prohibition. Section 266 (j) makes it a felony punishable by imprisonment for a maximum of 8 years to procure a child under the age of 14 for lewd or lascivious acts, and section 267 makes it a crime punishable by imprisonment in a state prison and a fine not exceeding \$2,000 to take away a person under the age of 18 without the parents' or guardian's consent for purposes of prostitution.

Finally, sections 315, 316 and 318 focus on disorderly houses and make it misdemeanors to keep such houses. To be noted here is that the fact that a house is one wherein prostitution is carried on may be proved by evidence of its general reputation (Pinkston v. Lieb 48 C.A.2d 352 (1942)); and by the fact that a female occupying this house is a prostitute (Ex parte Selowsky, 38 C.A. 569 (1918)).

The California Red Light Abatement Act, already discussed in the chapter on pornography, also applies to the control of prostitution. Although it was said in People ex. rel. Van de Kamp v. American Art Enterprises 33 Cal.3d 328, 188 Cal. Rptr. 740 (1983) that this act is not one for the abatement of prostitution per se but for the abatement of public nuisances, it must be remembered that prostitution is considered to be a nuisance per se (Farmer v. Behmer, 9 C.A. 773 (1909)).

(c) Florida

Chapter 796 of the Florida Penal Code deals with prostitution. The general offence is defined in s. 796.07 which prohibits in (2) (a) maintaining or keeping or operating any place for the purposes of prostitution, lewdness or assignation, (b) offering to secure another for the purposes of prostitution, etc., (c) receiving any person in any place for purposes of prostitution, etc., and (d) taking or transporting any person to any place for purposes of prostitution, etc. In this section, prostitution is defined as "the giving or receiving of the body for sexual intercourse for hire" and includes "the giving or receiving of the body for licentious sexual intercourse without

hire" but explictly excludes sexual intercourse between husband and wife. Lewdness includes "any indecent or obscene act" and assignation includes "the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement". Violation of these sections constitutes a misdemeanor of the second degree.

This section has been held not to be unconstitutionally vague (Bell v. State, 289 So2d. 388 (1973)). Furthermore, it has been held that, under this section, the mere act of offering to engage in sexual intercourse for a consideration is a violation, notwithstanding that no act overt act may have been completed (Pauline v. Lee, 147 So.2d 359 (1963)).

The other sections deal with keeping a house of ill fame (s. 796.01; a misdemeanor of the first degree), procuring an unmarried female under 16 years of age for purposes of prostitution (s. 796.03; a felony of the second degree), forcing someone to become a prostitute (s. 796.04; a felony of the third degree), living on the earnings of a prostitute (s. 796.05; a misdemeanor of the second degree), and renting space for the purposes of lewdness, assignation or prostitution (s. 796.06; a misdemeanor of the second degree).

(d) Pennsylvania

Under the Pennsylvania Penal Code s. 5902, four prostitution related offences are defined. Subsection (a) makes it a misdemeanor in the third degree (1) to be an inmate of a house of prostitution or otherwise engage in sexual activity as a business, or (2) to loiter in or within view of a public place for the purpose of bieng hired to engage in sexual activity. Subsection (b) makes it either a felony of the third degree (if there is force, or if the person engaged in prostitution is less than 16 years of age, or if the actor promotes that prostitution of his spouse, child, or ward), or otherwise a misdemeanor of the second degree to promote prostitution. Promoting prostitution includes: the managing or in any way controlling of a house of prostitution, the procuring of an inmate for a hoouse of prostitution, encouraging or inducing someone to become a prostitute, procuring a prostitute for a patron, transporting a person for purposes of prostitution, leasing a place to be regularly used for prostitution, or soliciting or receiving any benefit for the above. Living off a prostitute also constitutes an offence to subsection (b). Finally, a person commits a summary offense per subsection (e) if he hires a prostitute to engage in sexual activity or enters or remains in a house of prostitution for purposes of sexual activity.

This section has been declared not to be unconstitutionally over broad or vague since it does not regulate sexual acts which result from ordinary social situations but provides ascertainable standards of conduct directed at a defined evil consisting of the commercial exploitation of sexual gratification (Commonwealth v. Potts, 460 A.2d 1127 (1983)). In a very interesting decision, it was held that absent the showing that disparities between incidence of arrest of prostitute and incidence of arrest of clients and between incidence of arrest of female prostitutes and incidence of arrest of male prostitutes were occasioned by police methods in using "decoy" clients rather than using

"decoy" prostitutes, the defendant failed to establish selective enforcement patterns such as would have rendered the section unconstitutional on the basis of the equal protection amendment (Com. v. Finnegan 421 A.2d 1086, 280 Pa.Super. 584 (1980)). In another decision, the word "loiter" was defined as "standing around or moving slowly about or lingering" (Com. v. Roberson, 444 A.2d 722, 298 Pa.Super. 184 (1982)), thus confirming the previous decision of Com. v. Hill, 68 Berks 140 (1976) where it was held that the fact that the defendant was present on two separate occasions on the same evening at the same location on a parking lot in view of a public place and remaining there for a few minutes had engaged conversation and arranged to engage in sexual activity, was sufficient to prove that she did "loiter". It has furthermore been established that sexual activity need not occur for a prostitution to be committed (Comm. v. Wilson, 442 A.2d 760, 296 Pa.Super. 264 (1982), appeal granted 447 A.2d 1381, 498 Pa.529; and Com. v. Danko, 421 A.2d 1165, 281 Pa.Super. 97 (1980)).

Other State statutes are included in Appendices 18 to 21. It is already clear that the statutes, while they all prohibit prostitution in one way or another, do emphasize different aspects of the trade. Some include penalties for patronizing prostitutes some don't; some have equal punishments for both the prostitute and customer, some don't; pimping and pandering are always included but the penalties vary considerably from one State to the other; and keeping a house of ill-fame is generally included. Common to all these laws however are the facts that they require some form of decoy if not entrapment to be used for thier enforcement and that women prostitutes are the general target of the enforcement (this will be further discussed in the following section). As well, many of them include provisions focussing only on unmarried women, some adding the requirement that the woman be of previously chaste character. These are some of the controversial elements of these laws which bring various comentators to argue that they could potentially be invalidated on the following aspect: freedom of expression, right to privacy, equal protection, unusual treatment and punishment, and vagueness (16). So far however, none of the challenges on the constitutionality of State laws on prostitution has succeded. Courts have explicitly recognized that State laws constitute a valid exercise of the State's police powers and a that the goal of suppressing prostitution is a valid one. Courts have also held that laws on solicitation are valid since prostitution is a commercial proposal, and not the communication of ideas, and since solicitation to commit a crime had been itself established a crime at common law (17).

3. Enforcement Practices and Problems

Whether, on a rational or philosophical level, prostitution should be outlawed is a question that remains to be discussed. For police and prosecutorial agencies however, the question is how these laws can be enforced at the lowest cost and the most effectively. At the root of the problem of enforcing prostitution laws is the private nature of the act. Even though the transaction may commence -- and even actually occur for that matter -- in a public place (e.g., a parking lot), it remains almost invisible to the uninformed citizen. It remains so at least until a particular area of a city

becomes known as a haven for prostitution. Then public outcry is heard and the police asked to "do something". Yet, the "something" usually requires the use of "decoys" or other entrapment-like procedures which are costly and sometimes give little results. And always, street prostitutes run the higher risks of being arrested and prosecuted as compared to other types of prostitutes. While there were close to 51,000 arrests for prostitution related offences in all of the United States in 1975, more than 35,000 of these were females engaged in street prostitution (18). Nothing indicates that this has changed over the past years. We will now turn to an examination of some of the local enforcement policies and practices.

(a) New York

Prostitution is said to be a serious problem in New York City, especially in Manhattan, the borough where most of the arrests are made. According to the police however, it is almost impossible to estimate the actual size of the business. In Manhattan South only, the police claim that several hundred prostitutes work the streets. Similarly, the scope of indoor prostitution is "enormous": Screw magazine only would list not less than 250 different advertisements for prostitution. Numerous bars, porn movie houses, massage parlours, and other "businesses" are fronts for prostitution.

Police policy is to give top priority to street prostitution. Enforcement is selective and based on citizen complaints, the level of prostitution in a given area, and its impacts on the community. All members of the Public Morals Division participate in the enforcement of prostitution laws, not only in their areas of assignment but also in Manhattan South where prostitution is said to have the most deleterious effects on the residential and business communities. Indoor prostitution is enforced differently. Each District is responsible for its own area. Enforcement is also selective and based on citizen complaint and the impacts prostitution has on the community. Houses generating large numbers of complaints, those which are known to rip off the customers, and those suspected of hiring under age or unwilling prostitutes are usually selected first for enforcement. Police arrest statistics for a five-year period are the following:

	YEAR						
	1979	1980	1981	1982	1983		
direct prostitution	4255	4538.	4853	3775	3970		
loitering for prostitution (violation)	6978	5748	6970	3512	3037		
loitering for prostitution (misdemeanor)	3937	2178	4230	11008	12003		
Total	15170	12464	16053	18295	19010		

According to the Attorney's Office, over 92% of the arrests done in Manhattan result in convictions, the majority of which are by a guilty plea to the most serious charge since pleas of guilt to lesser charges are not accepted because of the effects prostitution has on the quality of life in the neighborhoods

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and because prostitution is believed to bring with it a variety of other more serious criminal activities. The maximum penalty unpon conviction for prostitution is 90 days in jail. Loitering for the purposes of prostitution is a violation punishable by a maximum of fifteen days in jail in the case of first offenders. For repeat offenders, it is a misdemeanor punishable by the maximum penalty. However, a study conducted by the Office of the District Attorney has shown that, in 1981, only 14% of the convicted prostitutes received jail sentences. In view of this finding, the Office proposed legislation to provide for mandatory penalties for repeat offenders. This Bill has not yet been acted upon by the Legislature.

(b) Cincinnati

According to the Cincinnati police, prostitution, similar to pornography, is no longer a serious problem in the city, due to the vigorous enforcement policies adopted. The number of arrests made however, when compared to those for pornography, show that the "battle" is still ongoing. In that respect, prostitution enforcement remains a top priority of the police force, particularly, we are told, because of the numerous problems it brings with it (e.g., assault, homicide, robbery, etc.). In fact, the police maintain that prostitution is a front for robbery.

Because "prostitution" (i.e., bawdy houses, etc.) cases have proven to be dangerous for officers, present policy is to concentrate on solicitation. The officer must therefore establish individual contact with the prostitute and bring her to engage in the transaction without causing entrapment. Periodically, a "decoy" female officer is also used to arrest the "johns". Included as Appendix 22 is a table indicating the number of arrests made over a five-year period for prostitution offences. The breakdown of the data for males and females, and blacks and whites is particularly interesting.

Unfortunately, we were not given detailed information on prosecution policies and practices.

(c) Seattle

Contrary to the enforcement of pornography where, it will be recalled, the number of arrests over the period 1979-1983 had gradually and constantly declined, enforcement of prostitution related offences has been on the rise. According to the Police Department it is the policy to enforce prostitution laws in a vigorous and consistent fashion, past experience having shown that modest enforcement contributes to increasing the problem and making it more resistent to renewed forms of control. The Vice Section has primary responsibility for prostitution enforcement. General Assignments, a sub-unit of the vice section, addresses itself primarily to the investigation of promoters, pimps, houses of prostitution, outcall or escort services and massage parlours. Street Vice, another sub-unit of the Vice Unit focuses on street prostitution. Although it is the Department's policy to target on the promoters and exploiters of prostitution, street solicitation is not left unabated.

According to the police, it is difficult to estimate the size of the business in the city, due to its changing nature. Currently, there would be a few adult entertainment theatres (also used for prostitution), only a hanful of massage parlours, and less than twenty escort or outcall services in the greater Seattle. The number of streetwlakers is unknown. Police statistics of arrests for the five-year period are: 1936 arrests in 1983, 1932 in 1982, 1310 in 1981, 1026 in 1980, and 1319 in 1979. We have no information regarding prosecution policies and conviction rates.

(d) Houston

Within the fifty-four men Vice Division of the Houston Police Department, thirty-seven are assigned to the enforcement of prostitution. Generally, prostitution cases are made by a vice officer operating undercover in one of the following manners: he works in or around clubs hotels or other facilities frequented by prostitutes and waits to be approached by a prostitute who will make an offer explictly stating the price and service offered; he observes a prostitute in an automobile slowing the traffic for purposes of soliciting a date and therefore violating the traffic regulations; or he observes a prostitute on foot soliciting passers-by and the charge is 'hitchhiking'.

We have no information on the size of the business in the city. The arrest statistics for a five-year period are the following: 1038 arrests in 1980 (816 of which were females), 1495 in 1981 (1177 females), 2793 in 1982 (2293 females), 3017 in 1983 (2210 females), and to date in 1984 867 arrests (539 females).

Clearly, enforcement of prostitution laws focuses on street solicitation and therefore females streetwalkers are overrepresented in the total enforcement picture. This will hardly surprise any observer of the prostitution scene but tends to add fuel to the arguments of the groups who oppose the criminalization of prostitution, at least as it is presently done.

5. Public Debates

There can be no doubt that, whatever the reasons are, the debates on prostitution are less visible than those on pornography, except in cities where prostitution affects some residential area, or when minors are involved. Two groups are particularly vocal on prostitution whose positions converge (whereas they sharply opposed on pornography): womens' groups and civil libertarians. In both cases, the criminalization of prostitution is decried as unequal and as as invasion of privacy. It also is argued that the criminal laws never have and never will change the fundamental problems of sexism and patriarchy which are considered to be the root causes of prostitution. In most cases, a total decriminalization of prostitution is requested, except where it involves the exploitation of the prostitution of others and the exploitation of juveniles. Regulation of the Nevada type is seen as less than a desirable solution since it so often implies an unfair treatment of the women who are

'detained' in the legal houses (19). There has been little, if any, breakthrough nor advances in this direction as far as we know, in all of the United States. We have seen no recent national survey on the American population's opinions and perceptions regarding this issue.



SUMMARY AND CONCLUSIONS

To summarize, it appears that pornography has, in the past five or six years. become an issue of concern in the United States. Many States have adapted their laws to reflect the new standards established in the Miller test, and many also have enacted new laws including stiffer penalties to fight the exploitation of children in pornography. The Federal government seems to be paving the way with respect to the issue of children and broadcasting. Furthermore, there is evidence of a new approach developing which would focus on the civil rights of the women and the exploitation and degradation that pornography involves. Some claim that these changes and new orientations have. at least in part, been spurred by the changes in the pornography depictions themselves, which, over the past few years, would have become more gross and violent. Apart from the famous snuff movies, and some very limited content analyses done by a few social psychologists, there is little evidence so far to support these contentions. This, however, does not mean that no changes have occured in the market. On the contrary, the video cassette revolution certainly is one of the important factors in explaining the present debates around pornographhy, be it only because it can easily enter the home without the supervision of the state. Here again, children are seen as of primary concern.

The prostitution scene has not changed that much over the past years. With the exception of the business refining itself and of the stiffer prohibitions against exploiting children for purposes of prostitution, the same trends seem to have continued. In that respect, and notwithstanding the introduction in many State laws of provisions prohibiting the actions of the customer as well as those of prostitutes, the prime targets for enforcement have remained the street prostitutes and females. In addition, whereas the Supreme Court has constantly sought to arrive at a strict definition of obscenity so as not to infringe upon the rights to free speech, the same has not occured for prostitution laws, many of which, at least on face value, appear overly broad and vague. Whether these contradictions will be resolved in the coming years is not evident from an analysis of actual trends.



FOOTNOTES

CHAPTER I - PORNOGRAPHY

- 1. 5 Stat. 566 s. 28
- 2. 18 U.S.C. s.1461 (1970) better known as the Comstock after the name of the moral crusader who, in a siglehanded effort, obtained passage of this act without opposition in the House or Senate. Comstock was then appointed a special agent to the Post Office Department (see Schauer, 1976:12-14).
- 3. (1868) L.R. 3 Q.B.
- 4. 29 Stat. 512 (1897)
- See State v. Miller, 145 W.Va. 59, 112 S.E.2d 472, 478 (1960); State v. Shapiro, 122 N.H. Super. 409, 300 A.2d 595, 609 (1973); and State v. Smith, 422 S.W.2d 50 (Mo. 1967), cert. denied, 393 U.S. 895 (1968), and most recently Pinkus v. United States, 436 U.S. 293 (1978) inter alia.
- 6. See also Hamling v. United States, 418 U.S. 87 (1974), but the reverse in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
- 7. See United States v. 31 Photographs, 156 F.Supp. 350 (S.D.N.Y. 1957).
- 8. Hamling v. United States, note 6 supra; also United States v. Reidel, 402 U.S. 351 (1971), and Roth v. United States, 354 U.S. 476 (1957), cited in Schauer, 1976:173.
- United States v. Orito, 413 U.S. 139 (1973), and United States v. B & H Dist. Corp., 403 U.S. 927 (1971) and 413 U.S. 909 (1973), cited in Schauer, 1976:180.
- 10. See for example, United States v. New Orleans Book Mart Inc., 490 F.2d 73 (5th Cir. 1974), cert. denied 419 U.S. 801, cited in Schauer, 1976:182.
- 11. See United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), and United States v. 12,200 Ft. Reels of Film, 413 U.S. 123 (1973), cited in Schauer, 1976:185.
- 12. See Redlick v. Capri Cinema Inc., 75 Misc.2d 117, 347 N.Y.S.2d 811 (1973), and People v. Heller, 33 N.Y.2d 314 (1973).
- 13. Per New York Consolidated Law (1977):
 Section 10.00 (4): "Misdemeanor" means an offence, other than a "traffic infraction" for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

(5): "Felony" means an offence for which a term of imprisonment in excess of one year may be imposed.

Felonies are classified into five categories (A to E) and misdemeanors into three categories (A, B, and unclassified) for sentencing purposes. A class A misdemeanor calls for a sentence of not more than a year but presumably more than three months (which is class B). A class D felony calls for a sentence of at least four years and not more than seven years.

- 14. People v. Howell, 395 N.Y.S.2d 933 (1977), and People v. Wrench, 371 N.Y.S.2d 833 (1975).
- 15. People v. Illardo, 48 N.Y.2d 408, 423 N.Y.S.2d 470 (1979), and People v. Martin, 420 N.Y.S.2d 318 (1979).
- 16. See People v. Kuhns (1976) 132 Cal.Rptr. 725, 61 C.A.3d 735, cert. denied 431 U.S. 973; People v. Enkstat (1973) 109 Cal.Rptr. 433, 33 C.A.3d 900, cert. denied 418 U.S. 937, inter alia.
- 17. Caplan v. State, 317 So.2d 855 (1975); State v. Papp, 298 So.2d 374 (1974), supplemented 316 So.2d 546; and Rhodes v. State, 283 So.2d 351 (1973).
- 18. U.S. General Accounting Office, Report to the Chairman, Subcommittee on Select Education and Labour, Washington, D.C., 1982, cited in Morality in Media, 1984.
- 19. Morality in Media, 1984:2-7
- 20. U.S. Commission on Obscenity and Pornography, Report to the President, Washington, D.C.: 1970, 7 vol.
- 21. Bryant, 1980; Clark, 1977; McKinnon, 1983; Dworkin, 1981; inter alia.
- 22. Minneapolis and Indiannapolis are the only two cities where such ordinances have been submitted to the municiapl councils and debated. The Minneapolis ordinance (attached as Appendix 16) has been passed by the Council but vetoed by the Mayor. An ordinance of a similar orientation but of a more limited scope has been presented to the Indiannapolis City Council.
- 23. McKinnon and Dworkin, 1983:6.
- 24. id., p.:7-8.

CHAPTER II - PROSTITUTION

- 1. For a more complete description of international agreements, conventions, or treaties in the areas of prostitution and pornography, see Sansfaçon, 1984. The United States have not yet signed nor become a party to the 1949 International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.
- 2. American Social Hygiene Association, 1973; George 1962.
- 3. Booth, 1945; Thornton, 1975; cited in George, 1962:719
- 4. United States v. Ratley, 284 F.2d 553 (2d Cir. 1960); Flanagan v. United States, 277 F.2d 109 (5th Cir. 1960); Griffin v. United States, 273 F.2d 958 (5th Cir. 1960); Hietler v. United States, 244 F. 140 (1917).
- 5. Simpson v. United States, 245 F. 278 (9th Cir.) cert. denied 245 U.S. 667 (1917).
- 6. Caminetti v. United States, 242 U.S. 470 (1917); Rockwell v. United States, 11 F.2d 452 (1940); Simon v. United States, 145 F.2d 345 (1944); White v. United States, 261 F.2d 907 (1959).
- 7. Cleveland v. United States, 329 U.S. 14 (1946); Burgers v. United States, 294 F. 1002 (1924).
- 8. Ghadiali v. United States, 17 F.2d 236 (9th Cir.), cert. denied 274 U.S. 747 (1927).
- 9. Haft, 1974; James, 1977; Bernier, 1983.
- 10. Perry, 1980.
- 11. Twenty States presently prohibit patronizing a prostitute; Perry, 1980:447, note 45.
- 12. United States v. Herrera, 584 F.2d 1137 (1978); People v. Costello, 395 N.Y.S.2d 139 (1977); People v. Block, 337 N.Y.S.2d 153 (1972).
- 13. People v. Costello, supra.
- 14. People v. Block, supra. Section 235.20 has already been discussed in the chapter on pornography. Let it be remembered that it defines sexual conduct as "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such a person be a female, breast."
- 15. People v. Costello, supra.

- 16. Jennings, 1976; Murray, 1979; Milman, 1980; Perry, 1980; Symanski, 1981; and Richards, 1982.
- 17. See for example, Morgan v. City of Detroit, 389 F. Supp. 922 (1975).
- 18. MacNamara and Sagarin, 1977:110.
- 19. Pillard, 1983.

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Department of Justice Ministère de la Justice Canada
Ottawa, Canada
K1A 0H8

Ottawa, April 4, 1984

The Honorable J. Van de Kamp Attorney General of California 800 Tishman Bldg., 3580 Wilshire Los Angeles, CA 90010

Dear Sir:

The Canadian Department of Justice is presently reviewing the issues of prostitution and pornography in order to determine whether changes to the Criminal Code will be necessary to adapt to the present situation.

To that effect the Minister of Justice has appointed a Special Committee mandated to hold hearings throughout the country and ascertain the views of the public. At the same time, the Department is conducting a socio-legal research programme designed to support and inform the work of the Special Committee and the policy requirements of the Department.

As the officer responsible for this programme I am reviewing, among other things, the situation in other countries, and in particular in the United States. As you can imagine I will not review every State's legislation and enforcement practices on each of these two questions. On the basis of a preliminary review of the literature and discussions, I have identified a number of States as representing a valid cross-section of the range of possible alternatives. I then wrote to police chiefs and District Attorneys in some of the major cities in each of these States, requesting some basic information.

It would be deceply appreciated if you would send me some additional information on the situation regarding both prostitution and pornography in your State. Specifically, such information as:

...2



-texts of State legal statutes or regulations;

-other pertinent legal regulations;

-State policies regarding these issues;

-recent signific at State Supreme court decisions; and

-present debates on these issues,

would be very helpful.

I clearly understand that it may not be easy to find all this information on short notice. Moreover, what I am asking for may not be sufficient for me to really understand the situation in your State. Once I have reviewed all information received and assessed what would still be needed, I may be able to arrange to meet with you or your representatives or other persons you would have identified.

Your cooperation is deeply appreciated.

Yours sincerely,

Daniel Sansfaçon

Research Criminologist Research and Statistics Ottawa, Canada K1A CH8

Ottawa, April 3, 1984

The Honorable R. Morgenthau District Attorney County of New York 1 Hogan Plaza New York NY 10013

Dear Sir:

The Canadian Department of Justice is presently reviewing the issues of prostitution and pornography in order to determine whether changes to the Criminal Code will be necessary to adapt to the present situation.

To that effect, the Minister of Justice has appointed a Special Committee mandated to hold hearings throughout the country and ascertain the views of the public. At the same time, the Department is conducting a socio-legal research programme designed to support and inform the work af the Special Committee and the policy requirements of the Department.

As the officer responsible for this socio-legal research programme I am reviewing the situation in other countries, and in particular in the United States. As you can imagine I will not review every State's legislation and enforcement practices on each of these two questions. On the basis of a preliminary review of the literature and discussions, I have identified a number a cities (16) as representing a valid cross-section of the range of possible alternatives.

It would be deeply appreciated if you would send me some basic information on the situation on prostitution and pornography in your city. Specifically, such information as:

-texts of legal statutes and municipal regulations or by-laws; -other forms of legal control which cities or districts may use(e.g., licensing); -the existence of censorship/classification boards and their legal status; -prosecution statistics for the past five years; -recent court interpretations; and -names of other resource persons.

would be very helpful.

I clearly understand that it may not be easy to find all this information on short notice. Moreover, what I am asking for may not be sufficient for me to really understand the situation in your community. Once I have contacted everyone and assessed what information would still be needed, I may be able to arrange to meet with you or your representative or other persons you would have identified.

Your cooperation is deeply appreciated.

Yours sincerely,

Daniel Sansfaçon

- and Jugar

Research Criminologist Research and Statistics Ottawa, April 3, 1984

Chief Patrick Fitzsimmons Seattle City Police Public Safety Bldg., Seattle, Wa., 98104

Dear Sir:

The Canadian Department of Justice is presently reviewing the issues of prostitution and pornography in order to determine whether changes to the Criminal Code will be necessary to adapt to the present situation.

To that effect, the Minister of Justice has appointed a Special Committee mandated to hold hearings throughout the country and ascertain the views of the public. At the same time, the Department is conducting a socio-legal research programme designed to support and inform the work af the Special Committee and the policy requirements of the Department.

As the officer responsible for this socio-legal research programme I am reviewing the situation in other countries, and in particular in the United States. As you can imagine I will not review every state's legislation and enforcement practices on each of these two questions. On the basis of a preliminary review of the literature and discussions, I have identified a number a cities (16) as representing a valid cross-section of the range of possible alternatives.

It would be deeply appreciated if you would send me some basic information on the situation on prostitution and pornography in your city. Specifically, such information as:

...2



-enforcement policies;

-enforcement statistics on each of these two issues for the past five years;

-evaluations of the size of the businesses; and

-evaluations of the extent to which these issues are social problems in your community,

would be very helpful.

I clearly understand that it may not be easy to find all this information on short notice. Moreover, what I am asking for may not be sufficient for me to really understand the situation in your community. I therefore would appreciate it if would also identify other resource persons in your city whom I could contact. Once I have been able to assess what information would still be needed I may be able to arrange to meet with you or your representatives or other persons you may have identified.

Your cooperation is deeply appreciated.

Yours sincerely,

Daniel Sansfaçon

Research Criminologist Research and Statistics cate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." Railway Mail Assn. v. Corsi, 326 U.S. 88, 96.

The judgments are

Affirmed.

[Opinions of Warren, C. J., and Harlan, J., Douglas, J., and Black, J., are omitted.]

Miller v. California 413 U.S. 15 (1973)

Mr. Chief Justice Burger delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2(a), a misdemeanor, by knowingly distributing obscene matter, and the Appel-

¹ At the time of the commission of the alleged offense, which was prior to June

25, 1969, §§ 311.2(a) and 311 of the California Penal Code read in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibit-

ing, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guility of a misdemeanor..."

"§ 311. Definitions "As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or

materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or

other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

late Department, Superior Court of California, County or Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material 2 when the mode of dissemination carries with it a

[&]quot;(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311 (c) of the California Penal Code, *supra*, was amended on June 25, 1969, to read as follows:

[&]quot;(e) 'Knowingly' means being aware of the character of the matter."

Cal. Amended Stats. 1969, c 249 § 1, p. 598. Despite appellant's contentions to the contrary, the record indicates that the new § 311 (c) was not applied ex post facto to his case, but only the old § 311 (c) as construed by state decisions prior to the commission of the alleged offense. See People v. Pinkus, 256 Cal. App. 2d 941, 948-950, 63 Cal. Rptr. 680, 685-686 (App. Dept., Superior Ct., Los Angeles. 1967); People v. Campisc, 242 Cal. App. 2d 905, 914, 51 Cal. Rptr. 815, 824 (App. Dept., Superior Ct., San Diego, 1966). Cf. Bouie v. City of Columbia, 378 U.S. 347 (1964). Nor did § 311.2, supra, as applied, create any "direct, immediate burden on the performance of the postal functions," or infringe on congressional commerce powers under Art. I, § 8, cl. 3. Roth v. United States, 354 U.S. 476, 494 (1957), quoting Railway Mail Assn. v. Corsi, 326 U.S. 88, 96 (1945). See also Mishkin v. New York, 383 U.S. 502, 506 (1966); Smith v. California, 361 U.S. 147, 150-152 (1959).

² This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," Roth v. United States, supra, at 487, but the Roth definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin obscaenus, ob, to pitacenum, filth, "obscene" is defined in the Webster's Third New International Dictionary (Unabridged 1969) as "1at disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolving as countering or violating some ideal or principle." The Oxford English Dictionary (1933 ed.) gives a similar definition, "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" derives from the Greek (porcharlot, and graphos, writing). The word now means "1: a description of prostitues or prostitution 2: a depiction (as in writing or painting) of licentiousness or leadings: a portrayal of erotic behavior designed to cause sexual excitement." Webst

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significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S. 557, 567 (1969); Ginsberg v. New York, 390 U.S. 629, 637-643 (1968); Interstate Circuit, Inc. v. Dallas, supra, at 690; Redrup v. New York, 386 U.S. 767, 769 (1967); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C. J., concurring); United States v. Reidel, 402 U.S. 351, 360-362 (1971) (opinion of Marshall, J.); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952); Breard v. Alexandria, 341 U.S. 622, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of Mr. Justice Brennan reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In Roth v. United States, 354 U.S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy..." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–72:

"'... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived

Third New International Dictionary, supra. Pornographic material which is obscene forms a sub-group of all "obscene" expression, but not the whole, at least as the word "obscene" is now used in our language. We note, therefore, that the words "obscene material," as used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material "which deals with sex." Roth, supra, at 487. See also ALI Model Penal Code § 251.4 (1) "Obscene Defined." (Official Draft 1962.)

from them is clearly outweighed by the social interest in order and morality....' [Emphasis by Court in Roth opinion.]

"We hold that obscenity is not within the area of constitutionally protected speech or press." 354 U.S., at 484-485 (footnotes omitted).

Nine years later, in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition

"as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.*, at 418.

The sharpness of the break with *Roth*, represented by the third element of the *Memoirs* test and emphasized by Mr. Justice White's dissent, *id.*, at 460-462, was further underscored when the *Memoirs* plurality went on to state:

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be *utterly* without redeeming social value." *Id.*, at 419 (emphasis in original).

While Roth presumed "obscenity" to be "utterly without redeeming social importance," Memoirs required that to prove obscenity it must be affirmatively established that the material is "utterly without redeeming social value." Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was "utterly without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the "utterly without redeeming social value" test had any meaning at all. See Memoirs v. Massachusetts, id., at 459 (Harlan, J., dissenting). See also id., at 461 (White, J., dissenting); United States v. Groner, 479 F.2d 577, 579–581 (CA5 1973).

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See e. g., *Redrup v. New York*, 386 U.S., at 770–771. We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc. v. Dallas,* 390 U.S., at 704–705 (Harlan, J., concurring and dissenting) (footnote omitted). This is not remarkable, for in the area of freedom of speech and press the courts must always remain

³ In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected.

sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author, and no Member of the Court today supports the Memoirs formulation.

Π

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S., at 354; Roth v. United States, supra, at 485.5 "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." Breard v. Alexandria, 341 U.S., at 642, and cases cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, 343 U.S., at 502. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, at 682-685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex,

by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* "policy." See Walker v. Ohio, 398 U.S. 434-435 (1970) (dissenting opinions of BURGER, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before a procedure of the support of the s brought before us.

⁴ See the dissenting opinion of Mr. JUSTICE BRENNAN in Paris Adult Theatre I v.

Slaton, post, p. 73.
 As Mr. Chief Justice Warren stated, dissenting, in Jacobellis v. Ohio, 378 U.S.

184, 200 (1964):
"For all the sound and fury that the Roth test has generated, it has not been "For all the sound and fury that we should try to live with it—at least until a more satisfactory definition is evolved. No government-be it federal, state, or local --should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no

matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the *Roth* case to provide such a rule."

⁶ See, e.g., Oregon Laws 1971, c. 743, Art. 29, §§ 255–262, and Hawaii Penal Code, Tit. 37, §§ 1210–1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126–129, as examples of state laws directed at depiction of defined physical conduct, and connected to expression. Other state formulations gould be really valid in this as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v. 12 200-ft. Reels of Film, post, at 130 n. 7.

which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, quoting Roth v. United States, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs v. Massachusetts, 383 U.S., at 419; that concept has never commanded the adherence of more than three Justices at one time. See supra, at 21. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See Kois v. Wisconsin, supra, at 232; Memoirs v. Massachusetts, supra, at 459-460 (Harlan, J., dissenting); Jacobellis v. Ohio, 378 U.S., at 204 (Harlan, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 284-285 (1964); Roth v. United States, supra, at 497-498 (Harlan, J., concurring and dissenting).

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation,

excretory functions, and lewd exhibition of the genitals. Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public

7 "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . " Kois v. Wisconsin, 408 U.S. 229. 231 (1972). See Memoirs v. Massachusetts, 383 U.S. 413, 461 (1966) (WHILE, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of

places.8 At a minimum, prurient, patently offensive depiction or descrip-

"social importance." See id., at 462 (White, J., dissenting).

8 Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to supress depictions or descriptions of the same behavior. In United States Y. O'Brien, 391 U.S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be "sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See California v. LaRue, 409 U.S. 109, 117-118 (1972).

tion of sexual conduct must have serious literary, artistic, political, or seientific value to merit First Amendment protection. See Kois v. Wisconsin, supra, at 230-232; Roth v. United States, supra, at 487; Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive question of fact anl law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.9

Mr. Justice Brennan, author of the opinions of the Court, or the plurality opinions, in Roth v. United States, supra; Jacobellis v. Ohio, supra; Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966); and Memoirs v. Massachusetts, supra, has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, Paris Adult Theatre I v. Slaton, post, p. 73 (Brennan, J., dissenting). Paradoxically, Mr. Justice Brennan indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, at 491-492. Cf. Ginsberg v. New York, 390 U.S., at 643.10 If the inability to define regulated materials

supra, at 491-492:
"Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. . . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. ... 'United States v. Petrillo. 332 U.S. 1, 7-8. These words, applied according to the proper standard for judging

⁹ The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in Roth v. United States, 354 U.S., at 492 n. 30, "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. Dunlop v. United States, 165 U.S. 486, 499-500."

10 As Mr. JUSTICE BRENNAN stated for the Court in Roth v. United States,

with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends. As to Mr. Justice Douglas' position, see *United States v. Thirty-seven Photographs*, 402 U.S. 363, 379–380 (1971) (Black, J., joined by Douglas, J., dissenting); *Ginzburg v. United States, supra*, at 476, 491–492 Black, J., and Douglas, J., dissenting); *Jacobellis v. Ohio, supra*, at 196 (Black, J., joined by Douglas, J., concurring); *Roth, supra*, at 508–514 (Douglas, J., dissenting). In this belief, however, Mr. Justice Douglas now stands alone.

MR. JUSTICE BRENNAN also emphasizes "institutional stress" in justification of his change of view. Noting that "[t]he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court," he quite rightly remarks that the examination of contested materials "is hardly a source of edification to the members of this Court." Paris Adult Theatre I v. Slaton, post, at 92, 93. He also notes, and we agree, that "uncertainty of the standards creates a continuing source of tension between state and federal courts" "The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." Id., at 92, 93.

It is certainly true that the absence, since Roth, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, 386 U.S. 767 (1967), and attempt to provide

positive guidance to federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because it will lighten our burdens. 11 Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis v. Ohio, supra,* at 187–188 (opinion of Brennan, J.). Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the

11 We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure specu-

lation.

obscenity, already discussed, give adequate warning of the conduct proscribed and mark '... boundaries sufficiently distinct for judges and juries fairly to administer the law ... That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. ... 'Id., at 7. See also United States v. Harriss, 347 U.S. 612, 624, n. 15; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340; United States v. Ragen, 314 U.S. 513, 523-524; United States v. Wurzbach, 280 U.S. 396; Hygrade Provision Co. v. Sherman, 266 U.S. 497; Fox v. Washington, 236 U.S. 273; Nash v. United States, 229 U.S. 373."

Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See *Roth* v. *United States, supra*, at 482-485. "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' [Roth v. United States, supra, at 498]; see *Manual Enterprises, Inc.* v. Day, 370 U.S. 478, 488 (opinion of Harlan, J.) [footnote omitted]." *Jacobellis* v. Ohio, supra, at 188 (opinion of Brennan, J.).

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs*. This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency," it was to apply "contemporary community standards of the State of California."

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards 12 or to the instructions of the trial judge on "statewide" stand-

¹² The record simply does not support appellant's contention, belatedly raised on appeal, that the State's expert was unqualified to give evidence on California "community standards." The expert, a police officer with many years of specialization in obscenity offenses, had conducted an extensive statewide survey and had given expert evidence on 26 occasions in the year prior to this trial. Allowing such expert testi-

ards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact, Mr. Chief Justice Warren pointedly commented in his dissent in Jacobellis v. Ohio, supra, at 200:

"It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards-not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.¹³ See Hoyt v. Minnesota, 399 U.S. 524-525 (1970) (Blackmun, J., dissenting); Walker v. Ohio, 398 U.S. 434 (1970) (BURGER, C. J., dissenting); id., at 434-435 (Harlan, J., dissenting); Cain v. Kentucky, 397 U.S. 319 (1970) (Burger, C. J., dissenting); id., at 319-320 (Harlan, J., dissenting); United States v. Groner, 479 F. 2d, at 581-583; O'Meara &

mony was certainly not constitutional error. Cf. United States v. Augenblick, 393

U.S. 348, 356 (1969).

13 In Jacobellis v. Ohio, 378 U.S. 184 (1964), two Justices argued that application of the second dissemination. tion of "local" community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal conviction by testing variations in standards from place to place. Id., at 193-195 (opinion of Brennan, J., joined by Goldberg, J.). The use of "national" standards, however, necessarily implies that materials found tolerable in some places but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized. See Roth v. United States, 354 U.S., at 506.

Appellant also argues that adherence to a "national standard" is necessary "in order to avoid unconscionable burdens on the free flow of interstate commerce." As

noted supra, at 18 n. 1, the application of domestic state police powers in this case did not intrude on any congressional powers under Art. I, § 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. See, c.g., Head v. New Mexico Board. 374 U.S. 424 (1963); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Breard v. Alexandria, 341 U.S. 622 (1951); H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 (1935); Sligh v. Kirkwood, 237 U.S. 52 (1915).

Shaffer, Obscenity in The Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Law. 1, 6-7 (1964). See also Memoirs v. Massachusetts, 383 U.S., at 458 (Harlan, J., dissenting); Jacobellis v. Ohio, supra, at 203-204 (Harlan, J., dissenting); Roth v. United States, supra, at 505-506 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S., at 508-509, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See Roth v. United States, supra, at 489. Cf. the now discredited test in Regina v. Hicklin, [1868] L. R. 3 Q. B. 360. We hold that the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.¹⁴

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press . . ." Breard v. Alexandria, 341 U.S., at 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, supra, at 484 (emphasis added). See Kois v. Wisconsin, 408 U.S., at 230-232; Thornhill v. Alabama, 310 U.S., at 101-102. But the public portrayal of hard-core sexual

¹⁴ Appellant's jurisdictional statement contends that he was subjected to "double jeopardy" because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures, but apparently alleging exposures at a different time in a different setting. Appellant argues that once material has been found not to be obscene in one proceeding, the State is "collaterally estopped" from ever alleging it to be obscene in a different proceeding. It is not clear from the record that appellant properly raised this issue, better regarded as a question of procedural due process than a "double jeopardy" claim, in the state courts below. Appellant failed to address any portion of his brief on the merits to this issue, and appellee contends that the question was waived under California law because it was improperly pleaded at trial. Nor is it totally clear from the record before us what collateral effect the pretrial dismissal might have under state law. The dismissal was based, at least in part, on a failure of the prosecution to present affirmative evidence required by state law, evidence which was apparently presented in this case. Appellant's contention, therefore, is best left to the California courts for further consideration on remand. The issue is not, in any event, a proper subject for appeal. See Mishkin v. New York, 383 U.S. 502, 512–514 (1966).

conduct for its own sake, and for the ensuing commercial gain, is a different matter.15

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see Roth v. United States, supra, at 482-485, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an "extraordinarily vigorous period," not just in economics and politics, but in belles lettres and in "the outlying fields of social and political philosophies." 16 We do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and "repression" of political liberty lurking in every state regulation of com-

mercial exploitation of human interest in sex.

Mr. JUSTICE Brennan finds "it is hard to see how state-ordered regimentation of our minds can ever be forestalled." Paris Adult Theatre I'v. Slaton, post, at 110 (Brennan, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which MR. JUSTICE BRENNAN finds constitutionally permissible, has all the elements of "censorship" for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. See Interstate Circuit, Inc. v. Dallas, 390 U.S., at 690.17 One can concede that the "sexual revolution" of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

In sum, we (a) reaffirm the Roth holding that obscene material is not

15 In the apt words of Mr. Chief Justice Warren, appellant in this case was "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide." Roth v. United States, supra, at 496 (concurring

opinion).

16 See 2 V. Parrington, Main Currents in American Thought ix et seq. (1930). As to the latter part of the 19th century, Parrington observed "A new age had come and other dreams—the age and the dreams of a middle-class sovereignty From the crude and vast romanticisms of that vigorous sovereignty emerged eventually a spirit of realistic criticism, seeking to evaluate the worth of this new America, and discover if possible other philosophies to take the place of those which had gone down in the fierce battles of the Civil War." Id., at 474. Cf. 2 S. Morison, H. Commager & W. Leuchtenburg. The Growth of the American Republic 197–233 (6th ed. 1969); Paths of American Thought 123–166, 203–290 (A. Schlesinger & M. White ed. 1963) (articles of Fleming, Lerner, Morton & Lucia White, E. Rostow, Samuelson, Kazin, Hofstadter); and H. Wish, Society and Thought in Modern America 337-386 (1952).

17 "[W]e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to. material objectionable as to them, but which a States clearly could not regulate as to adults. Ginsherg v. New York, . . . [390 U.S. 629 (1968)]." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690 (1968) (footnote omitted).

Appendix E

protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "utterly without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards," see Kois v. Wisconsin, supra, at 230, and Roth v. United States, supra, at 489, not "national standards." The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See United States v. 12 200-ft. Reels of Film, post, at 130 n. 7.

Vacated and remanded.

[Opinions of Douglas, J., Brennan, J., Stewart, J., and Marshall, J., are omitted.]

Paris Adult Theatre I v. Slaton 413 U.S. 49 (1973)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners are two Atlanta, Georgia, movie theaters and their owners and managers, operating in the style of "adult" theaters. On December 28, 1970, respondents, the local state district attorney and the solicitor for the local state trial court, filed civil complaints in that court alleging that petitioners were exhibiting to the public for paid admission two allegedly obscene films, contrary to Georgia Code Ann. § 26–2101. The two films

¹ This is a civil proceeding. Georgia Code Ann. § 26-2101 defines a criminal offense, but the exhibition of materials found to be "obscene" as defined by that statute may be enjoined in a civil proceeding under Georgia case law. 1024 Peachtree Corp. v. Slaton, 228 Ga. 102, 184 S.E. 2d 144 (1971); Walter v. Slaton, 227 Ga. 676, 182 S.E. 2d 464 (1971); Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 S.E. 2d 712 (1971). See infra, at 54. Georgia Code Ann. § 26-2101 reads in relevant part:

"Distributing obscene materials.

"(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters....

"(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished Title 18, United States Code, section 1461, provides:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

Title 18, United States Code, section 1462, provides:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

- (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motionpicture film, paper, letter writing, print, or other matter of indecent character; or
- (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or
- (c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

Title 18, United States Code, section 1463, provides:

All matter otherwise mailable by Law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 1464, provides:

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more the \$10,000 or imprisoned not more than two years, or both.

Title 18, United States Code, section 1465, provides:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

Title 19, United States Code, section 1305, provides:

(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket. or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: Provided, that the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: Provided further, that the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

Title 18, United States Code, Section 2251, provides:

- (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.
- (b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.
- (c) Any person who violates this section shall be fined not more than \$10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than \$15,000, or imprisoned not less than two years nor more than 15 years, or both.

Title 18, United States Code, Section 2252, provides:

(a) Any person who --

- (1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if --
 - (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
 - (B) such visual or print medium depicts such conduct; or
- (2) knowingly receives for the purpose of sale, or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if--
 - (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
 - (B) such visual or print medium depicts such conduct; shall be punished as provided in subsection (b) of this section.
- (b) Any person who violates this section shall be fined not more than \$10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than \$15,000, or imprisoned not less than two years nor more than 15 years, or both.

Title 18, United States Code, Section 2253, provides:

For the purposes of this chapter, the term --

- (1) "minor" means any person under the age of sixteen years;
- (2) "sexually explict conduct" means actual or simulated --
- (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
- (D) sado-masochistic abuse (for the purpose of sexual stimulation); or
- (E) lewd exhibition of the genitals or pubic area of any person;
- (3) "producing" means producing, directing manufacturing, issuing, publishing, or advertising, for pecuniary profit; and
- (4) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.

Public Law 98-292 98th Congress

An Act

May 21, 1984 [H.R. 3635]

To amend chapter 110 (relating to sexual exploitation of children) of title 18 of the United States Code, and for other purposes.

Child Protection Act of 1984. 18 USC 2251 note 18 USC 2251 note Child pornography

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Child Protection Act of 1984".

SEC. 2. The Congress finds that-

(1) child pornography has developed into a highly organized. multi-million-dollar industry which operates on a nationwide scale:

(2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and

(3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.

Penalties.

- SEC. 3. Section 2251 of title 18 of the United States Code is amended-
 - (1) by striking out "visual or print medium" each place it

appears and inserting "visual depiction" in lieu thereof;
(2) by striking out "depicting" each place it appears and inserting "of" in lieu thereof;

(3) by striking out "person" each place it appears in subsection (c) and inserting "individual" in lieu thereof;

(4) by striking out "\$10,000" and inserting "\$100,000" in lieu thereof;

(5) by striking out "\$15,000" and inserting "\$200,000" in lieu thereof; and

(6) by adding at the end of subsection (c) the following: "Any organization which violates this section shall be fined not more than \$250,000.

Penalties.

- SEC. 4. Section 2252 of title 18 of the United States Code is amended-
 - (1) by striking out ", for the purpose of sale or distribution for sale"
 - (2) by striking out "for the purpose of sale or distribution for sale" the second place it appears;

(3) by striking out "obscene" each place it appears;
(4) by striking out "visual or print medium" each place it appears and inserting "visual depiction" in lieu thereof;
(5) by striking out "depicts" each place it appears and inserting "is of" in lieu thereof.

ing "is of" in lieu thereof;

(6) by striking out "or knowingly sells or distributes for sale"

and inserting in lieu thereof "or distributes"; (7) by inserting after "mailed" the following: "or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails";

(8) by striking out "person" each place it appears in subsection (b) and inserting "individual" in lieu thereof; (9) by striking out "\$10,000" and inserting "\$100,000" in lieu

thereof:

(10) by striking out "\$15,000" and inserting "\$200,000" in lieu

thereof: and

(11) by adding at the end of subsection (b) the following: "Any organization which violates this section shall be fined not more than \$250,000.".

Sec. 5. (a) Section 2253 of title 18 of the United States Code is

amended-

(1) in paragraph (1), by striking out "sixteen" and inserting "eighteen" in lieu thereof;

(2) by striking out "sado-masochistic" and inserting "sadistic or masochistic" in lieu thereof;

(3) by striking out "(for the purpose of sexual stimulation)";

and (4) by striking out "lewd" and inserting "lascivious" in lieu thereof;

(5) by striking out ", for pecuniary profit"; and

(6) by amending paragraph (4) to read as follows:

"(4) 'organization' means a person other than an individual.". (b) Section 2253 of title 18 of the United States Code, as amended by subsection (a) is redesignated as section 2255.

SEC. 6. Chapter 110 of title 18 of the United States Code is amended by inserting after section 2252 the following:

"§ 2253. Criminal forfeiture

"(a) A person who is convicted of an offense under section 2251 or 2252 of this title shall forfeit to the United States such person's

"(1) any property constituting or derived from gross profits or

other proceeds obtained from such offense; and

"(2) any property used, or intended to be used, to commit such

"(b) In any action under this section, the court may enter such restraining orders or take other appropriate action (including acceptance of performance bonds) in connection with any interest that is subject to forfeiture.

(c) The court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, beyond a reasonable

doubt, that such property is subject to forfeiture.

(d)(1) Except as provided in paragraph (3) of this subsection, the customs laws relating to disposition of seized or forfeited property shall apply to property under this section, if such laws are not inconsistent with this section.

"(2) In any disposition of property under this section, a convicted person shall not be permitted to acquire property forfeited by such

"(3) The duties of the Secretary of the Treasury with respect to dispositions of property shall be performed under paragraph (1) of this subsection by the Attorney General, unless such duties arise from forfeitures effected under the customs laws.

"\$ 2254. Civil forfeiture

"(a) The following property shall be subject to forfeiture by the United States:

18 USC 2255.

18 USC 2253.

Property forfeiture. Ante, p. 204.

18 USC 2254.

Property forfeiture.

"(1) Any material or equipment used, or intended for use, in producing, reproducing, transporting, shipping, or receiving any visual depiction in violation of this chapter.

"(2) Any visual depiction produced, transported, shipped, or received in violation of this chapter, or any material containing

such depiction.

"(3) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Customs law

Law enforcement.

report

seq.

28 USC 522 note.

18 USC 2251 et

"(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.'

SEC. 7. The table of sections at the beginning of chapter 110 of title

18 of the United States Code is amended-

(1) by inserting after the item relating to section 2252 the following new items:

"2253. Criminal forfeiture. "2254. Civil forfeiture.";

and

(2) by redesignating the item relating to section 2253 as 2255. SEC. 8. Section 2516(1)(c) of title 18 of the United States Code is amended by inserting "sections 2251 and 2252 (sexual exploitation of children)," after "section 664 (embezzlement from pension and welfare funds),".

SEC. 9. Beginning one hundred and twenty days after the date of enactment of this Act, and every year thereafter, the Attorney General shall report to the Congress on prosecutions, convictions, and forfeitures under chapter 110 of title 18 of the United States Code.

Approved May 21, 1984.

LEGISLATIVE HISTORY-H.R. 3635 (S. 1469):

HOUSE REPORT No. 98-536 (Comm. on the Judiciary). CONGRESSIONAL RECORD:

Vol. 129 (1983): Nov. 14, considered and passed House. Vol. 130 (1984): Mar. 30, considered and passed Senate, amended. May 8, House concurred in Senate amendment.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 20, No. 21 (1984): May 21, Presidential statement.

CHAPTER 110--SEXUAL EXPLOITATION OF CHILDREN

Section

2251 Sexual exploitation of children

2252 Certain activities relating to material involving the sexual exploitation of minors

2253 Criminal forfeiture

2254 Civil forfeiture

2255 Definitions for chapter

§2251 Sexual exploitation of children

- (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.
- (b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.
- (c) Any individual who violates this section shall be fined not more than \$100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than \$200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than \$250,000.
- §2252 Certain activities related to material involving the sexual exploitation of minors

(a) Any person who--

- (1) knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if--
 - (A) the producing of such visual depiction involves the use of a minor engaged in sexually explicit conduct; and
 - (B) such visual depiction is of such conduct; or

- (2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails if—
 - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct: and
 - (B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than \$100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than \$200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than \$250,000.

§2253 See enrolled bill

§2254 See enrolled bill

§2255 Definitions for chapter

For the purpose of this chapter, the term--

- (1) "minor" means any person under the age of eighteen years;
- (2) "sexually explicit conduct" means actual or simulated--
- (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation:
 - (D) sadistic or masochistic abuse; or
 - (E) lascivious exhibition of the genitals or pubic areas of any person;
- (3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising, and
- (4) "organization" means a person other than an individual.

98TH CONGRESS 2D SESSION

S. 2769

To amend section 1464 of title 18, United States Code, relating to broadcasting obscene language and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 15 (legislative day, JUNE 11), 1984

Mr. Helms introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend section 1464 of title 18, United States Code, relating to broadcasting obscene language and for other purposes.

- 1 Be it enacted by the Senate and House of Representa-
- 2 tives of the United States of America in Congress assembled,
- 3 That this Act may be cited as the "Cable-Porn and Dial-
- 4 Porn Control Act".
- 5 SEC. 2. (a) Section 1464 of title 18, United States
- 6 Code, is amended to read as follows:

1	"§ 1464. Broadcasting, telecasting, or cablecasting of obscene, inde-
2	cent, or profane language; distributing obscene or in-
3	decent material by means of radio, television, or cable
4	television.
5	"(a) Whoever knowingly utters any obscene language,
6	or distributes any obscene material, by means of radio, televi-
7	sion, or cable television communication shall be fined not
8	more than \$20,000, or imprisoned not more than two years,
9	or both.
10	"(b) Whoever knowingly utters any indecent or profane
11	language, or distributes any indecent or profane material, by
12	means of radio, television, or cable television communication
13	shall be fined not more than \$10,000, or imprisoned not more
14	than two years, or both.
15	"(c) As used in this section, the term—
16	"(1) 'obscene language' or 'obscene material'
17	means any language or material respectively which-
18	"(A) the average person, applying contempo-
19	rary community standards for radio or television,
20	would find, taken as a whole, appeals to the pru-
21	rient interest;
22	"(B) depicts or describes, in a patently offen-
23	sive way (i) an ultimate sexual act, normal or per-
24	verted, actual or simulated, (ii) masturbation, (iii)
25	an excretory function, (iv) a lewd exhibition of a
26	human genital organ, or (v) flagellation, torture,

S 2769 IS

1	or other violence, indicating a sado-masochistic
2	sexual relationship; and
3	"(C) taken as a whole, lacks serious literary,
4	artistic, political, or scientific value;
5	"(2) 'indecent language' or 'indecent material'
6	means a depiction or description of (A) a human sexual
7	or excretory organ or function, (B) nudity, (C) an ulti-
8	mate sexual act, normal or perverted, actual or simu-
9	lated, (D) masturbation, (E) flagellation, torture, or
10	other violence, indicating a sado-masochistic sexual re-
11	lationship, which under contemporary community
12	standards for radio or television is presented in a pa-
13	tently offensive way; and
14	"(3) 'distribute' means to send, transmit, retrans-
15	mit, telecast, broadcast, or cablecast, including by wire
16	or satellite, or produce or provide such language or
17	material for distribution.
18	"(d) Nothing in this section is intended to interfere with
19	or preempt the power and right of the several States, includ-
20	ing political subdivisions thereof, over franchises or to regu-
21	late in this area as to obscenity, indecency, or profanity,
22	within their respective jurisdictions, in a manner which is not
23	inconsistent with this section.".
24	(b) The analysis of chapter 71 of title 18, United States
25	Code, is amended by deleting "1464. Broadcasting obscene

- 1 language." and inserting in lieu thereof "1464. Broadcasting,
- 2 telecasting, or cablecasting of obscene, indecent, or profane
- 3 language; distributing obscene or indecent material by means
- 4 of radio, television, or cable television.".
- 5 Sec. 3. (a) Subsection (b) of section 223 of the Commu-
- 6 nications Act of 1934 (47 U.S.C. 223) is amended to read as
- 7 follows:
- 8 ''(b)(1) Whoever—
- 9 "(A) in the District of Columbia or in interstate or
- foreign communication, by means of telephone, makes
- 11 (directly or by recording device) any comment, request,
- suggestion, or proposal which is obscene, lewd, lascivi-
- ous, filthy, or indecent, regardless of whether the
- maker of such comments placed the call, or
- 15 "(B) knowingly permits any telephone facility
- under such person's control to be used for any purpose
- prohibited by subparagraph (A),
- 18 shall be fined not more than \$50,000 or imprisoned not more
- 19 than six months, or both.
- 20 "(2)(A) In addition to the criminal penalties under para-
- 21 graph (1), whoever, in the District of Columbia or in inter-
- 22 state or foreign communication, violates paragraph (1)(A) or
- 23 (1)(B) for commercial purposes shall be subject to a civil fine
- 24 of not more than \$50,000 for each violation. For purposes of

- 1 this paragraph, each day of violation shall constitute a sepa-
- 2 rate violation.
- 3 "(B) A fine under this paragraph may be assessed
- 4 either—
- 5 "(i) by a court, pursuant to a civil action by the
- 6 Commission or any attorney employed by the Commis-
- sion who is designated by the Commission for such
- 8 purpose, or
- 9 "(ii) by the Commission, after appropriate admin-
- istrative proceedings.
- 11 "(3)(A) Either the Attorney General, or the Commission
- 12 or any attorney employed by the Commission who is desig-
- 13 nated by the Commission for such purpose, may bring suit in
- 14 a district court of the United States to enjoin any act or
- 15 practice which allegedly violates paragraph (1)(A) or (1)(B).
- 16 "(B) Upon a proper showing that, weighing the equities
- 17 and considering the likelihood of ultimate success, a prelimi-
- 18 nary injunction would be in the public interest, and after
- 19 notice to the defendant, such preliminary injunction may be
- 20 granted. If a full trial on the merits is not scheduled within
- 21 such period, not exceeding 20 days, as may be specified by
- 22 the court after issuance of the preliminary injunction, the in-
- 23 junction shall be dissolved by the court.".

- 1 (b) Subparagraph (A) of paragraph (1) of subsection (a)
- 2 of section 223 of the Communications Act of 1934 is re-
- 3 pealed.
- 4 (c) Subsection (c) of section 8 of the Federal Communi-
- 5 cations Commission Authorization Act of 1983 is repealed.

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STATUS OF GENERAL OBSCENITY LAWS

State	Follows Miller 3-Pronged Test	Statute or Decision	State or Local Standards	Remarks
Alabama	Yes .	§ 13A-12-150 § 13A-12-151 § 13A-12-152		Performances are prohibited only if monetary consideration.
Alaska				No statute.
Arizona	Yes	§ 13-3501 § 13-3502	Statewide	But live performances are not prohibited by statute.
Arkansas	Yes*	\$ 41-3502 \$ 41-3505 \$ 41-3565	Statewide	*But statute on obscene material and live performances requires appeal to prurient interest of average person. Separate statute on films, § 41-3579.
California	No	§ 311 § 311.2 § 311.6		1st prong considers predominant appeal. 2nd prong reads: taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters. 3rd prong reads: taken as a whole is utterly without redeeming social importance.
Colorado	Yes	§ 18-7-101 § 18-7-102		
Connecticut	Yes	§ 53a-193 § 53a-194	Statewide	1st prong considers predominant appeal. 2nd prong uses customary limits of candor.
Delaware	Yes	11§1364 11§1361		
District of Columbia	Yes	§ 22-2001 and Lakin v. United States, 363 A. 2d 990 (1976).		
Florida	Yes	§ 847.07 and § 847.011	Local, imposed by Davison v. State, 288 So. 2d 483 (1973).	
Georgia	Yes	16-12-80	Statewide*, imposed by Slaton v. Paris Adult Theatre I, 201 S.E. 2d 456 (1973). Cf. Jenkins v. Georgia, 418 U.S. 153 (1974).	But 1st prong considers predominant appeal. But see Showcase Cinemas, Inc. v. State, 274 S.E. 2d 578 (Ga. Ct. App. 1980).
Hawaii	Yes	\$ 712-1210 \$ 712-1214	Statewide	Definition of "pornographic" follows all three prongs, 3rd prong uses the word "merit" in place of "value," Monetary consideration required.
Idaho	Yes	§ 18-4101 § 18-4103 § 18-4104		
Illinois	No	38 § 11-20	Statewide, imposed by People v. Ridens 321 N.E. 2d 264 (1974).	Ridens court retained requirement that material be utterly without redeeming so (al value, Cr. Ward v. Flores, 423 U.S. 848 (1977).
Indiana	Yes	\$ 35-30-10.1-1 \$ 35-30-10.1-2 \$ 35-30-10.1-3		But 1st prong considers appeal of "domi- nant" theme of the matter or performance: "hid prong loos in it expressly in finding man "the prong of expressly including the

State	Follows Miller 3-Pronged Test	Statute or Decision	State or Local Standards	Remarks	
Iowa	Yes*	§ 728.4		*But statute only deals with sale or offers for sale of material depicting sado-maso-chism, excretory functions, use of a child in sex act or bestiality and is the only section that applies to adults in Iowa. "Average person" and "taken as a whole" are	
		N		applied to 1st and 2nd prongs. Statute does not apply to live sex acts or exhibiting obscenity. Statute legalizes: sale of obscene hardcore depictions or descriptions of: (1) sexual intercourse between humans,	
				normal or perverted, actual or simulated, (2) masturbation, (3) lewd exhibition of genitals, (4) fellatio, (5) cunnilingis. It also legalizes printing, advertising, importing, publishing and transferring of obscenity.	
Kansas	Yes	§ 21-4301(1) and (2) § 21-4301(5)		But 2nd prong omits simulated conduct and excretory functions, and 3rd prong adds "educational" to value test. But 1st prong considers predominant appeal, and 2nd prong omits simulated	
Kentucky	Yes .	§ 531.010 § 531.020			
Louisiana	Yes	14§ 106		conduct. Statute does not apply to live acts. Commercial only, 14§ 106(F) requires prior adversary hearing before charges may be brought and then punishment is restricted to activity thereafter (except for ulti-	
Maryland	Yes	27§§417 and 418 Definition: Derived from case law.		mate sexual acts, actual or simulated). Case law indicates that state courts must apply the definition of obscenity put forth by the U.S. Supreme Court. See, e.g., B & Co. v. State, 330 A.2d 701 (1975). Live acts are not prohibited except in one county.	
Massachusetts	Yes	C.272-§ 31 C.272-§ 29	County-wide	Where allegedly obscene matter is a book, an <i>in rem</i> proceeding must be held before criminal charges can be brought (Ch272 § 28C). "Taken as a whole" applied to all three prongs.	
Michigan	Yes	750.343a People v. Neumayer, 275 N.W. 2d 230 (1979).		But live performances are not included.	
Minnesota	Yes	275 N.W. 2d 230 (1979). State v. Welke, 216 N.W. 2d 641 (1974) § 617.241		1st prong considers dominant theme of the matter. Live performances are not dealt with. Separate statute for drive-in theaters (§ 617.298).	
Mississippi	Yes			Miller-type law passed in 1983. Temporary restraining order issued by Federal District	
Missouri	Yes	§ 573.010 § 573.020 and § 573.030	Local, imposed by McNary v. Carlton, 527 S.W. 2d 343 (1975).	Court. Commercial only. 1st prong considers predominant appeal; 2nd prong omits simulated conduct and excretory functions. "Considered as a whole" and "contemporary community standards" apply to all three prongs.	
Montana	Yes*	45-8-201		*But covers only material represented by seller to be "obscene," "Taken as a whole is applied to all three prongs. Evidence mainclude predominant appeal and educational or other merits. Local option permits	
Neoraska	Yes	§ 28-807 § 28-813		stricter laws at municipal and county level. 1st prong considers predominant appeal. 2nd prong omits simulated conduct.	

STATUS OF GENERAL OBSCENITY LAWS

		(Continue	ed from last issu)	
State	Follows Miller 3-Pronged Test	Statute or Decision	State or Local Standards	Remarks	
•					
Nevada	Yes	§ 201.235 § 201.249 § 201.253	Local 201.235		
New Hampshire	Yes*	§ 650:1 § 650:2	Countywide	*But 1st prong considers predominant appeal. Schools, museums, public libraries and government agencies which violate law after adversary hearing on obscenity may be prosecuted. State v. Manchester News Company, Inc., 387 A.2d 324 (N.H. Sup. Ct.), appeal dism'd 439 U.S. 949 (1978), excised that part of the definition of sexual conduct in 650:1(VI) which included touching of genitals, pubic areas, buttocks, or female breasts.	
New Jersey	Yes*	2C:34-2		*But 1st prong utilizes the dominant theme concept. "Sale" of obscenity only thing prohibited. No prohibition on obscene performances or exhibition of obscenity or obscene films.	
New Mexico	-			No adult statute, 30-38-1 allows for an injunction against the showing of obscene films in outdoor motion picture theatres using the <i>Miller</i> test.	
New York	Yes*	Penal Code, § 235.00 § 235.05 § 235.06 § 235.07	Statewide	*But 1st prong considers predominant appeal.	
North Carolina	Yes*	§ 14-190.1 § 14-190.3	Statewide	*But 2nd prong omits simulated conduct. Adversary, hearing must be held prior to criminal proceeding under §§ 14-190.1, .3,.4, and .5. 3rd prong adds "education- al" value to test.	
North Dakota	Yes*	§ 12.1-27.1-01	Statewide	*But 1st prong considers predominant appeal. Pecuniary gain required.	
Ohio	Yes	§ 2907.01 (State v. Burgun, 384 N.E. 2d 255 (1978))		Simulated activity is not prohibited, 3rd prong uses genuine scientific, educational, sociological, moral, or artistic purpose.	
Oklahoma	Yes	\$ 1024.1 \$ 1024.2 \$ 1040.8 \$ 1040.12	Statewide, imposed by McCrary v. State, 533 P.2d 629 (1974).	If mailable matter, criminal charges can be brought only after civil adjudication of obscenity, 21§ 1040.14 to 1040.22. Includes educational value in third prong.	

§ 1040.13

(1975).

State ex. rel. Field v. Hess, 540 P. 2d 1165

State	Follows Miller 3-Pronged Test	Statute or Decision	State or Local Standards	Remarks
Oregon	Yes*	§ 167.060 § 167.087	Statewide	*But simulated conduct is not considered; nor are excretory functions.
Pennsylvania	Yes	18 § 5903	Statewide	No reference is made to sado-masochism. Live performances are not dealt with. 3rd prong adds "educational" value to the test.
Puerto Rico	Yes	§ 4074 § 4075 § 4076		1st prong substitutes "attracts lascivious interest" for appeal to prurient interest. 3rd prong includes religious, scientific, or educational merit.
Rhode Island	Yes	§ 11-31-1	Statewide	Commercial only.
South Carolina	Yes*	§ 16-15-260 § 16-15-310 § 16-15-320	Statewide	*But 3rd prong adds "educational" value, § 16-15-270 requires judicial determination of obscenity before criminal charges may be brought.
South Dakota	_			No adult statute.
Tennessee	Yes	§ 39-6-1101	Statewide	
Texas	Yes	§ 43.21 § 43.23		
Utah	Yes	§ 76-10-1203 § 76-10-1204	Local	Simulated conduct is not dealt with.
Vermont			Statewide	
Virginia	Yes*	§ 18.2-372 § 18.2-374 § 18.2-375	Local, imposed by Price v. Commonwealth, 201 S.E. 2d 798 (1974)	*But 1st prong considers appeal or the dominant theme of the material.
Washington	Yes	7.48A.010 9.68.140	Statewide, imposed by State v. J-R Distributors, Inc., 512P. 2d 1049 (1973).	Only for-profit obscenity is unlawful.
West Virgina	_	8-12-5b 7-1-4		Municipalities and counties are given the option to enact statutory sections pertaining to obscenity and child pornography. Penal sanctions and injunctive relief are available for municipalities and counties under the statute.
Wisconsin	No			Statute declared unconstitutional in State v. Princess Cinema, 292 N.W. 2d 807 (Sup. Ct. Wisc. 1980).
Wyoming	Yes	§ 6-4-301 § 6-4-302		"Average person" applied to all three prongs.

ARIZONA

CHAPTER 35

OBSCENELY

Sec.	
13-3501.	Definitions
13-3502.	Production, publication, sale and possession of obscene items; classification
13-3503.	Seizure of obscene things; disposition
13-3504.	Coercing acceptance of obscine articles or publications;
13-3505.	Obscene prints and articles; jurisdiction
13-3506.	Furnishing obscede or harmful items to minors; classification
13-3507.	Public display of explicit sexual materials; classification; definitions; exemption
13-3509.	Films, photographs or motion pictures of minors; classification

13-3501. Definitions

In this chapter, unless the context otherwise requires:

1. "Item" includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription or other similar items.

2. An item is obscene within the meaning of this chapter when: (a) The average person, applying contemporary state standards / would find that the item, taken as a whole, appeals to the prurient

interest; and

(b) The item depicts or describes, in a patently offensive way, sexual activity as that term is described herein; and

(c) The item taken as a whole, lacks serious literary, artistic,

political or scientific value.

3. "Harmful to minors" means that quality of any description or representation, in whatever form, of mudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when to the average adult applying contemporary state standards with respect to what is suitable for minors, it appeals to the prurient interest of minors in sex, which portrays sexual conduct in a patently offensive way, and which does not have serious literary, artistic, political, or scientific value.

4. "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection

or inquiry of:

- (a) The character and content of any material described in this chapter, which is reasonably susceptible of examination by the defendant, and, if relevant to a prosecution for violation of section
- (b) The age of the minor, provided that an honest mistake shall constitute an excuse from liability under this article if the defendant made a reasonable bona fide attempt to ascertain the true age of such
- 5. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering,

or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

6. "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre custume, or the condition of being fettered, bound or otherwise physically restrained on

the part of one so clothed.

7. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

9. "Sexual activity" means:

(a) Patently offensive representations or descriptions

ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

10. "Ultimate sexual acts" means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.

13-3502. Production, publication, sale and possession of obscene items; classification A person is guilty of a class 6 felony who, knowingly:

- 1. Prints, copies, manufactures, prepares, produces, or reproduces any obscene item for purposes of sale or commercial distribution...
- 2. Publishes, sells, rents, lends, transports in intrastate conmerce, or commercially distributes or exhibits any obscene item, or offers to do any such things.
- 3. Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item.

13-3503. Seizure of obscene things; disposition

An obscene or indecent writing, paper, book, picture, print or figure found in possession, or under control of a person arrested therefor, shall be delivered to the magistrate before whom the person arrested is required to be taken, and if the magistrate finds it is obscene or indecent, he shall deliver one copy to the county attorney of the county in which the accused is liable to prosecution, and at once destroy all other copies. The copy delivered to the county attorney shall be destroyed upon conviction of the accused.

Coercing acceptance of obscene articles or 13-3504. publications; classification

A. No person, firm, association or corporation shall, as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the punchaser or consignee receive for resale any other item, article, book, or other publication which is obscene. No person, firm, association or corporation shall deny or threaten to deny any franchise or impose or

threaten to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such items, articles, books, or publications, or by reason of the return thereof.

B. A violation of any provision of subsection A is a class 5

felony.

13-3505. Obscene prints and articles; jurisdiction

A. The superior court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as described in subsection B of this section.

B. The county attorney of any county or the city attorney of any city in which a person, firm, association or corporation publishes, sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose, or in any other respect defined in section 13-3501, may maintain an action on behalf of such county or city for an injunction against such person, firm, association or corporation in the superior court to prevent the sale or further sale or the distribution or further distribution of the acquisition, publication or possession within the state of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photographed figure or image or any written or printed matter of an indecent character, described in this subsection or in section 13-3501.

C. The person, firm, association or corporation sought to be enjoined shall be entitled to a trial of the issues within ten days after joinder of issue and a decision shall be rendered by the court within ten

days of the conclusion of the trial.

D. If a final order or judgment of injunction is entered against the person, firm, association or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm, association or corporation to surrender to the sheriff of the county in which the action was brought any of the malter described in subsection B of this section and such sheriff shall be directed to seize and destroy such obscene prints and articles.

E. In any action brought as provided in this section, such county

attorney or city attorney bringing the action shall not be required to file any undertaking before the issuance of an injunction order provided

for in subsection C of this section.

F. The sheriff directed to seize and destroy such obscene prints and articles shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the

person, firm, association or corporation sought to be enjoined.

G. Every person, firm, association or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in subsection B of this section, after the service upon him of a summons and complaint in an action brought pursuant to this section is chargeable with knowledge of the contents thereof.

13-3506. Furnishing obscene or harmful items to manars;

A. It is unlaaful for any person knowingly to give, lend, show, advertise for sale or distribute explicit sexual material, as defined in section 13-3507, to minors or to give, lend, show, advertise for sale or distribute to minors any item which is harmful to minors.

B. It is unlawful for any person knowingly to openly display explicit sexual material, as defined in section 13-3507, or material harmful to minors in any place where minors are invited as part of the

general public.

C. A violation of any provision of subsection A or B of this section is a class 5 felony.

13-3507. Public display of explicit sexual materials; classification; definitions; exemption

A. It is unlawful for any person knowingly to place explicit sexual material upon public display, or knowingly to fail to take prompt action to remove such a display from property in his possession or under his control after learning of its existence.

B. A person who violates any provision of this section is guilty

of a class 6 felony.

C. For the purposes of this section:

1. "Explicit sexual material" means any drawing, photograph, film negative, motion picture, figure, object, novelty device, recording, transcription or any book, leaflet, pamphlet, magazine or booklet, the cover or contents of which depicts human genitalia or depicts or verbally describes sexual conduct or sexual excitement or sadomasochistic abuse. Explicit sexual material does not include any depiction or description which, taken in context, possesses serious educational value for minors or which possesses serious literary, artistic, political or scientific value,

2. "Public display" means the placing of material on or in a billboard, viewing screen, theater marquee, newsstand, display rack, window, showcase, display case or similar place so that material within the definition of paragraph 1 of this subsection is easily visible or readily accessible from a public thoroughfare, from the property of others, on in any-place where minors are invited as part of the general

D. The prohibition of this section shall not apply to broadcasts or telecasts through facilities licensed under the federal

communications act.

13-3508. Films, photographs or motion pictures of minors; classification

A. It is unlawful for any person knowingly to film, photograph, develop, distribute, exhibit, transport or sell any film, photograph, slide or notion picture, or the negatives thereof, in which minors are engaged in sexual conduct which is obscene as defined in section 13-3501 or other acts harmful to minors as defined in section 13-3501.

B. A violation of subsection A of this section is a class 3

felony.

CHAPTER 35.1

SEXUAL EXPLOITATION OF CHILDREN

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Sec.	
13-3551.	Definitions
13-3552.	*Commercial sexual exploitation of a minor; classification
13-3553.	Sexual exploitation of a minor; classification
13-3554.	Portraying adult as minor; classification
13-3555.	Permissible inferences

13-3551. Definitions

In this chapter, unless the context otherwise requires:

1. "Producing" means financing directing manufacturing, issuing, publishing or advertising for pecuniary cain.

2. "Sexual conduct" means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex.

(b) Penetration of the vagina or rectum by any object except when

done as part of a recognized medical procedure.

(c) Sexual bestiality.

(d) Masturbation, for the purpose of sexual stimulation of the viewer.

(e) Sadomasochistic abuse for the purpose of sexual stimulation

of the viewer.

(f) Lewd exhibition of the genitals, public or rectal areas of any person.

(g) Defecation or unination for the purpose of sexual stimulation

of the viewer.

3. "Simulated" means any depicting of the genitals or rectal areas which gives the appearance of sexual conduct or incipient sexual conduct.

"Visual or print medium" means:

(a) Any film, photograph, videotope, negative, slide or

(b) Any book, magazine or other form of publication or photographic reproduction containing or incorporating in any names any film, photograph, videotape, negative or slide.

13-3552. Commercial sexual exploitation of a misor; classification

A. A person commits commercial sexual exploitation of a minor by

knowingly:

1. Using, employing, persuading, enticing, inducing or coercing a minor to engage in or assist others to engage in sexual conduct for the purpose of producing any visual or print medium deficting such conduct.

2. Permitting a minor under such person's custody or control to engage in or assist others to engage in sexual conduct for the purpose of

producing any visual or print medium depicting such conduct.

3. Transporting or financing the transportation of any minor through or across this state with the intent that such minor engage in prostitution or sexual conduct for the purpose of producing a visual or print medium depicting such conduct.

B. Commercial sexual exploitation of a minor is a class 2 felony.

13-3553. Sexual exploitation of a minor; classification

A. A person commits sexual exploitation of a minor by knowingly:

- 1. Recording, filming, photographing, developing or duplicating any visual or print medium in which minors are engaged in sexual conduct.
- 2. Distributing, transporting, exhibiting, receiving, selling, purchasing, possessing or exchanging any visual or print medium in which minors are engaged in sexual conduct.

B. Sexual exploitation of a minor is a class 2 felony.

13-3554. Portraying adult as minor; classification

A. It is unlawful for any person depicted in a visual or print medium as a participant in sexual conduct to masquerade as a minor.

B. It is unlawful for any person knowingly to produce, record, film, photograph, develop, duplicate, distribute, transport, exhibit, sell, purchase or exchange any visual or print medium whose text, title or visual representation depicts a participant in sexual conduct as a minor even though any such participant is an adult.

C. Any person who violates this section is guilty of a class 1

misdemeanor.

13-3555. Permissible inferences

In a prosecution relating to the sexual exploitation of children, the trier of fact may draw the inference that a participant is a minor if the visual or print medium through its title, text or visual representation depicts the participant as a minor.

GEORGIA

16-12-80 OFFENSES AGAINST PUBLIC HEALTH AND MORALS 16-12-80

PART 1

GENERAL PROVISIONS

16-12-89. Distributing obscene materials.

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material; provided, however, that the character and reputation of the individual charged with an offense under this law, and, if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

- (1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;
- (2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and
- (3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) below:
 - (A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
 - (B) Acts of masturbation;
 - (C) Acts involving excretory functions or lewd exhibition of the genitals;
 - (D) Acts of bestiality or the fondling of sex organs of animals; or
 - (E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship;

7-7-180

- (c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.
- (d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.
- (e) It is an affirmative defense under this Code section that dissemination of the material was restricted to:
 - (1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to-such-material; or
 - (2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.
- (f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature. (Ga. L. 1878-79, p. 163, § 1; Code 1882, § 4537a; Penal Code 1895, § 394; Penal Code 1910, § 385; Code 1933, § 26-6301; Ga. L. 1935, p. 158, § 1; Ga. L. 1941, p. 358, § 1; Ga. L. 1956, p. 801, § 1; Ga. L. 1963, p. 78, § 1; Code 1933, § 26-2101, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1971, p. 344, § 1; Ga. L. 1975, p. 498, §§ 1, 2.)

Cross references. — As to constitutional guarantee of free speech and press, see Ga. Const. 1976, Art. I, Sec. I, Para. IV. Law reviews. — For comment on Stanley

v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) as to constitutional protection of private possession of obscene material, see 21 Mercer L. Rev. 337 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CONSTITUTIONAL ISSUES
PRESEIZURE ADVERSARY HEARING
COMMUNITY STANDARD
COMPARATIVE EVIDENCE
INJUNCTIVE RELIEF
APPLICATION

- 1. IN GENERAL
- 2. Considerations in Determining Obscentty
- 3. DETERMINATION OF NUMBER OF OFFENSES COMMUTTED

General Consideration

States have power to determine that public exhibition of obscene materials is

harmful. — States have power to make morally neutral judgment that public exhibition of obscene material, or commerce in such material, has tendency to

16-12-81 OFFENSES AGAINST PUBLIC HEALTH AND MORALS 16-12-81

16-12-81. Distribution of material depicting nudity or sexual conduct.

(a) A person commit the offense of distributing material depicting nudity or sexual conduct when he sends unsolicited through the mail-or otherwise unsolicited causes to be delivered material depicting nudity or sexual conduct to any person or residence or office unless there is imprinted upon the envelope or container of such material in not less than eight-point boldface type the following notice:

"Notice — The material contained herein depicts mudity or sexual conduct. If the viewing of such material could be offensive to the addressee, this container should not be opened but returned to the sender."

- (b) As used within this Code section, the term:
- (1) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering or the depiction of covered male genitals in a discernibly turgid state.
- (2) "Sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed-genitals, pubic area, buttocks, or, if the person is female,
- (c) A person who commits the offense of distributing material depicting nudity or sexual conduct, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than three years or by a fine not to exceed \$10,000.00, or both. (Code 1933, § 26-2102, enacted by Ga. L. 1970, p. 173, § 1.)

guarantee of free speech and press, see Ga. Const. 1976, Art. I, Sec. I, Para. IV.

Law reviews. — For comment on a nuisance abatement statute applied to authounnamed films, in the future as violative of Ga. L. Rev. 1076 (1979).

Cross references. - As to constitutional the federal Constitution in Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978), probable jurisdiction noted, 442 U.S. 928, 99 S. Ct. 2857, 61 L. Ed. 2d 295 (1979), aff'd, 445 U.S. 308, 100 rize prior restraint on exhibition of S. Ct. 1156, 63 L. Ed. 2d 413 (1980), see 13

JUDICIAL DECISIONS

Cited in Fishman v. State, 229 Ga. 133, 189 S.E.2d 429 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d. Lewdness, Indecency and Obscenity, §§ 10, 11, 15, 20-23.

ALR. — Exclusion from evidence of parts of a publication, or mail matter, other than those charged to be obscene, or oral testimony relating to purpose or effect of publication as a whole, 69 ALR 644.

What amounts to an obscene play or book within prohibition statute, 81 ALR 801.

Constitutional guaranties of freedom of speech and of the press as applied to statutes and ordinances providing for licensing or otherwise regulating distribution of printed matter or solicitation of subscriptions therefor, 127 ALR 962.

Modern concept of obscenity, 5 ALR3d

16-12-82. Public nuisances.

The use of any premises in violation of any of the provisions of this part shall constitute a public nuisance. (Code 1933, § 26-2103, enacted by Ga. L. 1971, p. 344, § 2.)

Cross references. — As to definition of public nuisance, see § 41-1-2. As to procedure for abatement of houses of prostitution, buildings used for purposes of lewdness, solicitation of sodomy, etc., see Ch. 3, T. 41.

Code commission note. — Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974), gives the constitutional prerequisites for obtaining an injunction such as that authorized under this section.

JUDICIAL DECISIONS

Expression outside defined area is constitutionally protected expression. — Any statute or ordinance which seeks to impose criminal or civil sanctions for exercise of expression that is not obscene cannot withstand a proper constitutional attack for overbreadth. Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974).

Injunction impermissible to suppress distribution of literature on basis of previous publications. — An injunction is impermissible and unconstitutional where it operates not to redress alleged private wrongs but to suppress, on the basis of previous publications, distributions of literature of any kind. Sanders v. State, 231 Ga. 603, 203 S.E.2d 153 (1974).

One obscene book on premises of bookstore does not make entire store obscene. Sanders v. State, 231 Ga. 608, 203 S.F.2d 153 (1974).

Padlocking premises based on sale of single obscene publication constitutes prior restraint. — Section is an unconstitutional prior restraint when construed and applied to authorize padlocking of premises on grounds that sale of single obscene publication rendered premises a nuisance. 660 Lindbergh, Inc. v. City of Atlanta, 492 F. Supp. 511 (N.D. Ga. 1980).

Closing portion of business after finding violations of this article does not constitute prior restraint. — Court's ordering closure of portion of business under nuisance statute after finding instances of lewdness, public indecency, solicitation of sodomy, and sodomy, does not constitute a prior restraint on plaintiffs' rights under U.S. Const., Amend. 1, 660 Lindbergh, Inc. v. City of Atlanta, 492 F. Supp. 511 (N.D. Ga. 1980).

Cited in Speight v. Slaton, 356 F. Supp 1101 (N.D. Ga. 1973); Speight v. Slaton, 415 U.S. 333, 94 S. Ct. 1098, 39 L. Ed. 2d

367 (1974).

16-12-83 OFFENSES AGAINST PUBLIC HEALTH AND MORALS 16-12-85

RESEARCH REFERENCES

ALR. — Modern concept of obscenity, 5 ALR. — Modern concept of obscenity, 5

1 Ambition of obscene motion pictures as nursince, 50 ALR3d 969.

Pornoshops or similar places disseminating obscene materials as nuisance, 58 ALR3d 1134.

16-12-83. Contraband.

Any materials declared to be obscene by this part and advertisements for such materials are declared to be contraband. (Code 1933, § 26-2104, enacted by Ga. L. 1971, p. 344, § 3.)

JUDICIAL DECISIONS

Since mere possession of obscene materials is not illegal, obscene materials are not contraband per se. Warshaw v. Eistman Kodak Co., 148 Ga. App. 670, 252 S.E.2d 182 (1979).

Defendant in trover action for return of allegedly obscene material must show it was contraband. Warshaw v. Eastman Kodak Co., 148 Ga. App. 670, 252 S.E.2d 182 (1979).

RESEARCH REFERENCES -

ALR. — Constitutional guaranties of freedom of speech and of the press as applied to statutes and ordinances providing for licensing or otherwise regulating distribution of printed matter or

solicitaion of subscriptions therefor, 127 ALR 962.

Modern concept of obscenity, 5 ALR3d 1158.

16-12-84. Public indecency in plays, nightclub acts, motion pictures, etc.

Repealed by Ga. L. 1981, p. 915, § 2, effective April 9, 1981.

16-12-85. Display of restricted film previews to general audiences.

- (a) It shall be unlawful for any motion picture theater owner, operator, or projectionist to display to the audience within the theater scenes from a film to be shown at the theater at some future time when the viewing of that film from which the scenes are taken is restricted to adults or requires minors to be accompained by a parent or guardian. Scenes of such restricted films may be shown within a theater if the audience has been similarly restricted as to viewing age and conditions.
- (b) This Code section shall not apply to motion pictures which are not rated as to viewing audience nor to the first display of a preview trailer from any motion picture.

16-12-111 OFFENSES AGAINST PUBLIC HEALTH AND MORALS 16-12-112

16-12-111. Selling, showing, etc., of lewd, indecent, etc., materials to

It shall be unlawful for any person knowingly to engage in the business of selling, lending, giving away, showing, advertising for sale, or distributing to any minor; or to have in his possession with intent to engage in the said business; or otherwise to offer for sale or commercial distribution to any minor; or to display in public or at newsstands or any other business establishment frequented by minors or where minors are or may be invited as a part of the general public any motion picture or live show, or any still picture, drawing, sculpture, photograph, or any book, pocket book, pamphlet, or magazine the cover or content of which contains descriptions or depictions of illicit sex or sexual immorality or which is lewd, lascivious, or indecent, or which contains pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse just or passion or to exploit sex, just, or perversion for commercial gain, or any article or instrument of indecent or immoral use, (Ga. L. 1969, p. 222, § 2; Code 1933, § 26-3502, enacted by Ga. L. 1981, p. 1578. § 1.)

Cross references. — As to constitutional guarantee of free speech and press, see Ga. Const. 1976, Art. I, Sec. I, Para. IV.

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, C.J.S. — 67 C.J.S. Obscenity, §§ 3, 6, 7, Lewdness, Indecency, and Obscenity, §§ 9, 13, 16.

16-12-112. Sale of tickets to minors or admission of minors to motion pictures, etc.

It shall be unlawful for any person knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor to the premises whereon there is exhibited a motion picture, show, or other presentation the exhibition of which to a minor would violate Code Section I6-12-111. (Ga. L. 1969, p. 222, § 3; Code 1933, § 26-3503, enacted by Ga. L. 1981, p. 1578, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d. C.J.S. — 67 C.J.S., Obscenity, §§ 3, 13. Lewdness, Indecency, and Obscenity, §§ 9.

Ohio Obscenity Laws

Revised 1980



Attorney General William J. Brown

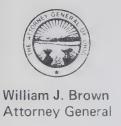
30 East Broad Street Columbus, Ohio 43215 614-466-4320

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State of Chin Unice of the Attorney Ceneral



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Dear Ohio Citizen:

Section 109.40 of the Ohio Revised Code provides:

The attorney general shall compile all statutes relative to obscenity in a convenient pamphlet or paper and may distribute this compilation, without charge, to such sheriffs, police chiefs, county prosecutors, city prosecutors, mayors, constables, judges of the courts of common pleas, county court judges, municipal judges, and other interested parties, as may request such distribution, and make available a reasonable number of such compilations to fill such requests.

The attorney general shall, from time to time, supplement and keep the compilation current and he may, upon request, distribute such supplemental material in the manner provided in this section.

To comply with this statute, this compilation of the current Ohio statutes relating to the control of obscenity has been produced. The text further contains a discussion of the obscenity test promulgated by the United States Supreme Court.

Very truly yours,

William & Brown

WILL FAM IT THEFT.

Alteria

The Supreme Court in Miller v. California, 413 U.S. 15 (1978), established standards to guide the states in defining and regulating obscenity. It explained that although obscene material is unprotected by the First Amendment, there are inherent dangers in any attempt to regulate expression. It, therefore, set forth limitations on the permissible scope of such regulation and stated that, under those limitations, no one will be subject to prosecution for dealing with obscene materials unless those materials depict or describe patently offen-sive "hard-core" sexual conduct specifically described by the requlating state law, as written or construed. Id. at 27.

A. PERMISSIBLE SCOPE OF REGULATION

The court set forth basic guidelines which must be followed by the finder of fact in determining whether a particular work is obscene. The guidelines are:

- (A) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- (B) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (C) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id. at 24.

It also provided what it referred to as "a few plain examples" of what a state could define for regulation under part (B) of the guidelines:

Patently offensive representations or descriptions of ultimate sexual acts normal or perverted, actual or simulated.

Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Several Of These Terms Have Been Judicially Construed:

In determining the questions of prurient interest and patent offensiveness, the finder of fact is to determine the effect of the material upon "the average person, applying contemporary community standards." Juries must be properly instructed so that the members consider the entire community and not simply their own personal reactions to the material or the reaction of particularly sensitive or insensitive persons or groups within the community. Pinkus v. United States, 436 U.S. 293, 300-301 (1978); Smith v. United States, 431 U.S. 291, 305 (1977).

Expert testimony is not necessary if the material itself is placed in evidence, and the jury is not bound by the opinion of any expert who does testify. Hamling v. United States, 418 U.S. 87, 100 (1974). In making this determination a juror is entitled to draw upon his own knowledge of the views of the average person in the community from which he comes just as he is entitled to draw upon his knowledge of the propensities of a "reasonable" person in other areas of the law. Id. at 104; Smith v. United States, supra, 431 U.S. at 302.

The fact that similar materials are available elsewhere in the community does not mean that they are admissible as tending to prove the non-obscenity of the material in issue. The availability of similar material merely means other persons are engaged in similar activities. Hamling v. United States, supra, 418 U.S. at 125-126.

If the material involved is intended for a clearly defined deviant sexual group, the fact that it does not appeal to the prurient interest of the "average" person does not preclude a finding of obscenity. It is sufficient if the material appeals to the prurient interest in sex of the members of that group. Hamling v. United States, supra, 418 U.S. at 128-129; Mishkin v. New York, 383 U.S. 502, 508-509 (1966).

2. Prurient Interest

The court in Roth v. United States, 354 U.S. 476, 487 n. 20 (1957), stated that material appealing to the prurient interest was material having a tendency to incite lustful thoughts. It also quoted a portion of the Model Penal Code which contains the following definition of prurient interest.

* * * [A] shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or

3. Patently Offensive

Although the question of patent offensiveness is a question of fact, juries do not have unlimited discretion. The examples in Miller, while not intended to be exhaustive, indicate that there are limits beyond which a jury may not go in determining that a particular material is patently offensive. In order to be obscene the material must describe or depict the hard-core types of conduct suggested by those examples. Smith v. United States, supra, 431 U.S. at 301; Jenkins v. Georgia, 418 U.S. 153, 160 (1974); Hamling v. United States, supra, 418 U.S. at 114.

Although they are not similar to the materials described in the Miller examples, sadomasochistic materials may be prohibited as obscene. Ward v. Illinois, 431 U.S. 767, 773 (1977). Such materials are defined obscene by R.C. 2907.01(F)(5).

B. THE APPLICABLE STATE LAW

The criminal statutes dealing with obscenity are contained in Chapter 2907 of the Revised Code. R.C. 2907.01 is the definitional section. It contains the following definitions relating to obscenity.

1. Definitions

* * * * * * * * * *

- (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
- (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.
- (C) "Sexual activity" means sexual conduct or sexual contact, or both.

* * * * * * * *

(E) Any material or performance is "harmful to juveniles," if it is offen-

- sive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:
- (1) It tends to appeal to the prurient interest of juveniles;
- (2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;
- (3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;
- (4) It contains a display, description, or representation of human bodily functions of elimination;
 - (5) It makes repeated use of foul language;
 - (6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;
- (7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.
- (F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:
- (1) Its dominant appeal is to prurient interest;
- (2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

- (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
- (4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose;
- (5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic pur-
- (G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
- (H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.
- (I) "Juvenile" means an unmarried person under the age of eighteen.
- (J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure,

image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance"
means any motion picture,
preview, trailer, play,
show, skit, dance or other
exhibition performed before
an audience.

* * * * * * * * *

The substantive offenses dealing with obscenity are set forth at R.C. 2907.31 et seq. The main statute is R.C. 2907.32 which prohibits the pandering of obscenity. It provides as follows:

2. Pandering Obscenity

- (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
- (1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;
- (2) Exhibit or advertise for sale or dissemination, sell or publicly disseminate or display any obscene material;
- (3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;
- (4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;
- (5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.
- (B) It is an affirmative defense to a charge under this section, that the material or performa-

ance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

a. Statutory Limitations

1) Scienter

R.C. 2907.32 provides that a person must have "knowledge of the character of the material or performance."

R.C. 2907.35(A)(2) provides a presumption of such knowledge if the person has actual notice of the nature of such material or performance.

(A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling materials or exhibiting performances, who, in the course of business:

* * * * * * * * *

(2) Does any of the acts prohibited by section 2907.31 or 2907.32 of the Revised Code, is presumed to have knowledge of the character of the material or performance involved, if he has actual notice of the nature of such material or performance whether or not he has precise knowledge of its contents.

The Ohio Supreme Court has held that knowledge or notice of the "nature" of the material is constitutionally sufficient to satisfy the requirement of scienter. It also held

that such knowledge may be shown by circumstantial evidence. State v.

Burgun, supra, 56 Ohio St.2d at 364.

In that case the defendants were shown to have knowledge of the nature of the material from the fact that as cashiers, they were in full view of the sexually oriented material.

2) Commercial Exploitation

The statute only prohibits the sale or public dissemination of obscene material. Private dissemination is not included unless it is done for gain. Possession of such material is not prohibited unless it is done with the intent to sell it or disseminate it publicly. Vol. 1, Schroeder & Katz, Ohio Criminal Law, Crimes and Procedure at 95-96.

R.C. 2907.05(A)(1) provides a presumption of such an intention if a commercial establishment possesses five or more substantially similar obscene articles.

- (A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling materials or exhibiting performances, who, in the course of business:
- (1) Possesses five or more identical or substantially similar obscene articles, having knowledge of their character, is presumed to possess them in violation of division (A)(5) of section 2907.32 of the Revised Code.

b. Authoritative Construction

The Ohio Supreme Court has construed this statute to incorporate the test for obscenity set forth in the Miller case. State v. Burgun, 56 Ohio St.2d 354 (1978). In an obscenity case the jury is to be instructed as to the requirements of the statute. It is then to be given a "narrowing" instruction restricting the definition of obscenity to the test laid down in Miller. Id. at 361. This procedure was approved by the United States Supreme Court in Ward v. Illinois, 431 U.S. 767 (1977).

c. <u>Judicial Decisions Concerning The Validity</u> Of R.C. 2907.32

The court in <u>Burgun</u> held that the statute as so construed, was constitutional. This holding was reaffirmed in <u>State</u> v. <u>Thomas</u>, 57 Ohio

Judge Manos, of the United States District Court for the Northern District of Ohio, Eastern Division, held that, even as authoritatively construed to incorporate the Miller test, R.C. 2907.32 is unconstitutionally vague and over broad. Sovereign News Co. v. Falke, Case No. C77-230. The decision followed a remand from the Court of Appeals for consideration of the statute in light of the decision in the Burgun case. The opinion of the Court of Appeals is contained in 610 F.2d 428.

Judge Manos also found the statute unconstitutional in two habeas corpus cases. Turoso v. Cleveland Municipal Ct., Case No. C79-442; and Turoso v. Cleveland Municipal Ct., Case No. C79-747. The validity of the statute was upheld by two other judges of the same court. The statute was found valid by Judge Thomas in Turoso v. Cleveland Municipal Ct., Case No. C79-1010 and by Judge Battisti in Burgun v. Cleveland Municipal Ct., Case No. C79-1900.

Judge Young of the United States District Court for the Northern District of Ohio, Western Division upheld the validity of the statute in Janicki v. City of Toledo, Case No. C78-242.

All of the federal cases are pending on appeal. $\,$

3. Statutes Involving Juveniles

The United States Supreme Court has held that a state may properly grant minors a more restrictive right than that afforded to adults to determine what sexual material they may see and read. Ginsberg v. New York, 390 U.S. 629, 637 (1968). Ohio has several obscenity statutes relating to minors.

R.C. 2907.31 prohibits the dissemination of matter harmful to juveniles.

- (A) No person, with knowledge of its character, shall recklessly furnish or present to a juvenile any material or performance which is obscene or harmful to juveniles.
- (B) The following are affirmative defenses to a charge under this section, involving material or a performance which is harmful to juveniles but not obscene:
- (1) The defendant is the parent, guardian, or

spouse of the juvenile in-

- (2) The juvenile involved, at the time the material or performance was presented to him was accompanied by his parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.
- (3) The juvenile exhibited to the defendant or his agent or employee a draft card, driver's license, birth certification, marriage license, or other official or apparently official document purporting to show that such juvenile was eighteen years of age or over or married, and the person to whom such document was exhibited did not otherwise have reasonable cause to believe that such juvenile was under the age of eighteen and unmarried.
- (C) It is an affirmative defense to a charge under this section, involving material or a performance which is obscene or harmful to juveniles, that such material or performance was furnished or presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person.
- (D) Whoever violates this section is guilty of disseminating matter harmful to juveniles. If the material or performance involved is harmful to juveniles but not obscene, violation of this section is a misdemeanor of the first degree. If the material or performance involved is obscene, violation of this section is a felony of the fourth degree.

This section was held to be constitutional by the Court of Common Pleas of Cuyahoga County in Grosser v. Woollett, 45 Ohio Misc. 15, 27-28 (1975). That decision was affirmed by the Court of Appeals on May 29, 1975.

- R.C. 2907.321 prohibits the pandering of obscenity involving a minor.
 - (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
 - (1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers, when the offender knows that the material will be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;
 - (2) Exhibit or advertise for sale or dissemination, sell, or publicly disseminate or display any obscene material that has a minor as one of its participants or portrayed observers;
 - (3) Create, direct, or produce an obscene performance, that has a minor as one of its participants, when the offender knows that it will be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;
 - (4) Advertise for presentation, present, or participate in presenting an obscene performance, that has a minor as one of its participants, when the performance is presented publicly, or when admission is charged for the performance;
 - (5) Possess or control any obscene material, that has a minor as one of its participants, with purpose to violate division (A)(2) or (4) of this section.
 - (B) It is an affirmative defense to a charge under this section that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pur-

- suing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.
- (C) Whoever violates this section is guilty of pandering obscenity involving a minor, a felony of the fourth degree. If the offender has previously been convicted of a violation of this section, then pandering obscenity involving a minor is a felony of the third degree.
- R.C. 2907.33 prohibits deception to obtain matter harmful to juveniles.
 - (A) No person, for the purpose of enabling a juvenile to obtain any material or gain admission to any performance which is harmful to juveniles, shall do either of the following:
 - (1) Falsely represent that he is the parent, guardian, or spouse of such juvenile;
 - (2) Furnish such juvenile with any identification or document purporting to show that such juvenile is eighteen years of age or over or married.
 - (B) No juvenile, for the purpose of obtaining any material or gaining admission to any performance which is harmful to juveniles, shall do either of the following:
 - (1) Falsely represent that he is eighteen years of age or over or married;
 - (2) Exhibit any identification or document purporting to show that he is eighteen years of age or over or married.
 - (C) Whoever violates this section is guilty of deception to obtain matter harmful to juveniles, a misdemeaner of the second degree. A juvenile who violanes division (B) of this section shall be adjudged as unruly child, with sub-disposition of the sub-day may be approprise. The Chapter 2151. On the Laise is code.

4. Miscellaneous Statutes

R.C. 2907.34 prohibits compelling acceptance of objectionable material as a condition to the sale or delivery of other material.

- (A) No person, as a condition to the sale or delivery of any material or goods of any kind, shall, over the objection of the purchaser or consignee to accept any other material reasonably believed to be obscene, or which if furnished or presented to a juvenile would be in violation of section 2907.31 of the Revised Code.
- (B) Whoever violates this section is guilty of compelling acceptance of objectionable materials, a felony of the fourth degree.

In addition to the presumptions of notice and intent R.C. 2907.35¹ provides that the chief legal officer may give actual notice of the character of material or a performance.

- (B) Without limitation on the manner in which such notice may be given, actual notice of the character of material or a performance may be given in writing by the chief legal officer of the jurisdiction in which the person to whom the notice is directed does business. Such notice, regardless of the manner in which it is given, shall identify the sender, identify the material or performance involved, state whether it is obscene or harmful to juveniles, and bear the date of such notice.
- R.C. 2907.36 grants standing to the chief legal officer and any person who has received notice pursuant to R.C. 2907.35(B), to bring an action for a declaratory judgment to determine whether a particular material or performance is obscene.
 - (A) Without limitation on the persons otherwise entitled to bring an

action for a declaratory judgment pursuant to sections 2721.01 to 2721.15 of the Revised Code, involving the same issue, the following persons have standing to bring such an action to determine whether particular materials or performances are obscene or harmful to juveniles:

- officer of the jurisdiction in which there is reasonable cause to believe that section 2907.31 or 2907.32 of the Revised Code is being or is about to be violated;
- (2) Any person who, pursuant to division (B) of section 2907.35 of the Revised Code, has received notice in writing from a chief legal officer stating that particular materials or performances are obscene or harmful to juveniles.
- (B) Any party to an action for a declaratory judgment pursuant to division (A) of this section is entitled, upon his request, to trial on the merits within five days after joinder of the issues, and the court shall render judgment within five days after trial is concluded.
- (C) An action for a declaratory judgment pursuant to division (A) of this section shall not be brought during the pendency of any civil action or criminal prosecution, when the character of the particular materials or performance involved is at issue in the pending case, and either of the following apply:
- (1) Either of the parties to the action for a declaratory judgment is a party to the pending case;
- (2) A judgment in the pending case will necessarily constitute res judicata as to the character of the materials or performances involved.
- (D) A civil action or criminal prosecution in which the character of

¹ R.C. 2907.35(C) excludes a motion picture operator from criminal liability. The Court of Appeals of Cuyahoga County has held that this exclusion is unconstitutional. State v. Burgun, 49 Ohio App.2d 112, 125-127 (1966).

particular materials or performances is at issue, brought during the pendency of an action for a declaratory judgment involving the same issue, shall be stayed during the pendency of the action for a declaratory judgment.

(E) The fact that a violation of section 2907.31 or 2907.32 of the Revised Code occurs prior to a judicial determination of the character of the material or performance involved in the violation, does not relieve the offender of criminal liability for the violation, even though prosecution may be stayed pending the judicial determination.

R.C. 2907.31 provides that the chief legal officer of a jurisdiction may bring an action to enjoin the pandering of obscenity or the dissemination of matter harmful to juveniles.

- (A) Where it appears that section 2907.31 or 2907.32 of the Revised Code is being or is about to be violated, the chief legal officer of the jurisdiction in which the violation is taking place or is about to take place may bring an action to enjoin the violation. The defendant, upon his request, is entitled to trial on the merits within five days after joinder of the issues, and the court shall render judgment within five days after trial is concluded.
- (B) Premises used or occupied for repeated violations of section 2907.31 or 2907.32 of the Revised Code constitute a nuisance subject to abatement pursuant to sections 3767.01 to 3767.99 of the Revised Code.

5. Nuisance

R.C. 3767.01(C) defines a nuisance to include a place where obscene films are prepared or shown.

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, contacted, or

exists, or any place, in or apor which lewe, indecent, lessivious, or lobscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufaced, exhibited, or other-wise developed, screened, exhibited, or otherwise prepared or shown, and the personal property and tured, developed, screenpersonal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine or other publi-cation entered as second class matter by the postoffice department.

R.C. 3767.02 provides that any person who conducts, owns an interest in, is employed by, or in control of a nuisance shall be enjoined.

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

R.C. 3767.03 provides that the attorney general, the prosecuting attorney or any citizen of the county may maintain an action to abate a nuisance.

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which crom nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, amon the relation of such attorney general, prosecuting attorney, or person, to apate such received and to perportation equals to perportation equals to perportation equals and to perportation.

maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a tond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

The obscenity nuisance abatement procedure authorized by the above statutes was found to be constitutional in State ex rel. Keating v. Vixen, 35 Ohio St.2d 215 (1973); and State ex rel. Ewing v. Without A Stitch, 37 Ohio St.2d 95 (1974). An appeal in the Ewing case was dismissed by the United States Supreme Court in Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975).

At that time the definition of obscenity was contained in R.C. 2905.34. The Ohio Supreme Court has stated that statute contained a "far more generalized description of obscenity than that found in R.C. 2907.01(F)." State v. Burgun, supra, 56 Ohio St.2d at 360.

In Vance v. Universal Amusement, Inc., 100 S.Ct. 1156 (1980), however, the Supreme Court held that the Texas nuisance law, which is similar to that of Ohio, was unconstitutional. Texas law permitted a restraint of the exhibition of a motion picture which had not been finally adjudicated to be obscene. A temporary injunction could be issued upon a showing of probable success on the merits. There was no provision in the Texas law for treating this type of case differently from any other case. For such a restraint to be valid, there must be an assurance of a prompt final judicial determination of the film's obscenity.

Ohio does have a provision for the prompt determination of nuisance cases. R.C. 3767.05 provides that such cases shall be set for trial at the first term of the court and shall have precedence over most other civil actions.

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. * * *

6. Municipal Corporations

R.C. 715.54 grants municipal corporations the authority to restrain and prohibit obscene materials.

Any municipal corporation may restrain and prohibit distribution, sale and exposure for sale of books, papers, pictures and periodicals or advertising matters of an obscene or immoral nature.

"very carefully, very carefully" was not mitted intimate relations with commonreversible error where defendant had ad-wealth's principal witness. Id.

§ 5903. Obscene and other sexual materials

- (a) Offenses defined.—No person, knowing the obscene character of the materials involved, shall:
 - (1) display or cause or permit the display of any explicit sexual materials as defined in subsection (c) in or on any window, showcase, newsstand, display rack, billboard, display board, viewing screen, motion picture screen, marquee or similar place in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare, or in any business or commercial establishment where minors, as a part of the general public or otherwise, are or will probably be exposed to view all or any part of such materials;
 - (2) sell, lend, distribute, exhibit, give away or show any obscene materials to any person 17 years of age or older or offer to sell, lend, distribute, exhibit or give away or show, or have in his possession with intent to sell, lend, distribute, exhibit or give away or show any obscene materials to any person 17 years of age or older, or knowingly advertise any obscene materials in any manner;
 - (3) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials;
 - (4) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom, or by what means any obscene materials can be purchased, obtained or had; or
 - (5) hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in this subsection.
- (b) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:
- "Community." For the purpose of applying the "contemporary community standards" in this section, community means the State.
- "Knowing." As used in subsection (a), knowing means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any material described therein which is reasonably susceptible of examination by the defendant.
- "Obscene materials." Any literature, including any book, magazine, pamphlet, newspaper, storypaper, comic book or writing, and any figure, visual representation, or image including any drawing, photograph, picture or motion picture, if:

- (1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;
- (2) the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and
- (3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

"Sexual conduct." Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

"Transportation facility." Any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, rail, motor vehicle or any other method, including aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations.

- (c) Dissemination to minors.—No person shall knowingly disseminate by sale, loan or otherwise explicit sexual materials to a minor. "Explicit sexual materials," as used in this subsection, means materials which are obscene or:
 - (1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors: or
- (2) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1), or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.
- (d) Admitting minor to show.—It shall be unlawful for any person knowingly to exhibit for monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture show or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors, except that the foregoing shall not apply to any minor accompanied by his parent,
- (e) Definitions.—As used in subsections (c) and (d) of this section:
 - (1) "Minor" means any person under the age of 17 years.

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- (2) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
- (3) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.
- (4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
- (5) "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
- (6) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
 - (i) predominantly appeals to the prurient, shameful, or morbid interest of minors; and
 - (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
 - (iii) is utterly without redeeming social importance for minors.
 - (7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
 - (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant; and
 - (ii) the age of the minor: Provided, however, That an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.
- (f) Requiring sale as condition of business dealings.—No person shall knowingly require any distributor or retail seller as a condition to sale or delivery for resale or consignment of any literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or image, or any written or printed matter, or any article or instrument to purchase or take by consignment for purposes of sale, resale or distribution any obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, figure or

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image, or any written or printed matter of an obscene nature or any article or instrument of an obscene nature.

(g) Injunction.—The attorney for the Commonwealth may institute proceedings in equity in the court of common pleas of the county in which any person violates or clearly is about to violate this section for the purpose of enjoining such violation. The court shall issue an injunction only after written notice and hearing and only against the defendant to the action. The court shall hold a hearing within three days after demand by the attorney for the Commonwealth, one of which days must be a business day for the court, and a final decree shall be filed in the office of the prothonotary within 24 hours after the close of the hearing. A written memorandum supporting the decree shall be filed within five days of the filling of the decree. The attorney for the Commonwealth shall prove the elements of the violation beyond a reasonable doubt. The defendant shall have the right to trial by jury at the said hearing.

(h) Criminal prosecution.—

- (1) Any person who violates subsection (a) or (f) is guilty of a misdemeanor of the first degree. Violation of subsection (a) is a felony of the third degree if the offender has previously been convicted of a violation of subsection (a) or if the material was sold, distributed, prepared or published for the purpose of resale.
- (2) Any person who violates subsection (c) or (d) is guilty of a misdemeanor of the first degree. Violation of subsection (c) or (d) is a felony of the third degree if the offender has previously been convicted of a violation of subsection (c) or (d).
- (3) Findings made in an equity action shall not be binding in the criminal proceedings.
- (i) Right to jury trial:—The right to trial by jury shall be preserved in all proceedings under this section.
- (j) Exemptions.—Nothing in this section shall apply to any recognized historical society or museum accorded charitable status by the Federal Government, any county, city, borough, township or town library, any public library, any library of any school, college or university or any archive or library under the supervision and control of the Commonwealth or a political subdivision.
- (k) Ordinances or resolutions.—Nothing in this chapter shall be construed to invalidate, supersede, repeal or preempt any ordinance or resolution of any political subdivision insofar as it is consistent with this chapter, and political subdivisions further retain the right to regulate any activities, displays, exhibitions or materials not specifically regulated by this chapter.

1972, Dec. 6, P.L. 1482, No. 334, § 1, effective June 6, 1973. As amended 1977, Nov. 5, P.L. 221, No. 68, § 1, effective in 60 days; 1980, Oct. 16, P.L. 978, No. 167, § 2, effective in 60 days.

§ 43.04. Aggravated Promotion of Prostitution

(a) A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.

(b) An offense under this section is a felony of the third degree.

[Acts 1973, 62rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.]

§ 43.05. Compelling Prostitution

(a) A person commits an offense if he knowingly:

(1) causes another by force, threat, or fraud to commit prostitution; or

(2) causes by any means a person younger than 17 years to commit prostitution.

(b) An offense under this section is a felony of the second degree.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.]

§ 43.06. Accomplice Witness: Testimony and Im-

- (a) A party to an offense under this subchapter may be required to furnish evidence or testify about the offense.
- (b) A party to an offense under this subchapter may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury.

(c) For purposes of this section, "adjudicatory proceeding" means a proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(d) A conviction under this subchapter may be had upon the uncorroborated testimony of a party to the offense.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.] [Sections 43.07 to 43.20 reserved for expansion] SUBCHAPTER B. (OBSCENITY)

§ 19.21. Definitions

(a) La this subchapter:

- (1) "Obscene" means material or a performance that:
- (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
 - (B) depicts or describes:
- (i) patently offensive representations or descriptions of ultimate sexual acts, normal reperverted, actual or simulated, including sexuthe space side of any and eagurable thatter

- (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
- (C) taken as a whole, lacks serious literary, artistic, political, and scientific value.
- (2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.
- (3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.
- (4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.
- (5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.
- (6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.
- (7) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.
- (b) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1975, 64th Leg., p. 372, ch. 103, § 1, eff. Sept. 1, 1975; Acta 1979, 68th Lcg., p. 1974, ch. 778, § 1, eff. Sept. 1, 1979.]

Sections 3 and 4 of the 1979 amendatory act provided "Sec. 3. If any portion of this Act is declared or (while by a crust of competent jurisdiction, this declaration does not invalidate any off or portions of

this Act.

"Sec. 4. This Act agains only to offensis committed on or iffer its effective date. A criminal action for an unence committed before this Act's effective dumination of the committed before this Act's effective dumination of the committed before the committed before the climate of this Act, are customed in iffert for this purpose is find on the effect. For the purpose of this section in unforce as committed before the effect.

§ 43.22. Obscene Display or Distribution

- (a) A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.
- (b) An offense under this section is a Class C misdemeanor.

[Acts 1973, 63rd Log., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.]

§ 43.23. Obscenity

- (a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.
- (b) An offense under Subsection (a) of this section is a felony of the third degree.
- (c) A person commits an offense if, knowing its content and character, he:
 - (1) promotes or possesses with intent to promote any obscene material or obscene device; or
 - (2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.
- (d) An offense under Subsection (c) of this section is a Class A misdemeanor.
- (e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.
- (f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.
- (g) This section does not apply to a person who possesses or distributes obscene material or obscene devices or participates in conduct otherwise prescribed by this section when the possession, participation, or conduct occurs in the course of law enforcement activities.

[Acts 1973, 63rd Leg., p. 883, ch. 329, § 1, eff. Jan. 1, 1974. Amended by Acts 1979, 66th Leg., p. 1975, ch. 778, § 2, eff. Sept. !, 1979]

Sections 3 and 4 of the 1979 amendatory act provided:

"Sec. 3. If any portion of this Act is declared unlawful by a court of competent jurisdiction, this declaration does not invalidate any other portions of this Act.

"Sec 4. This Act applies only to offenses committed on or after its effective date. A criminal action for an offense committed before this Act's effective date is governed by the law in existence before the effective date of this Act, and Sactions 40.24 and 43.23, Plan II Oude, as in existence before the effective date of this Act, are continued in effect for this purpose as if this Act were not in effect. For the oursoes of this section, an offense is committed before the effective date of this Act if any element of the offense is committed before the offense in Color.

- § 43.24. Sale, Distribution, or Display of Harmful Material to Minor
 - (a) For purposes of this section:
 - (1) "Minor" means an individual younger than 17 years.
 - (2) "Harmful material" means material whose dominant theme taken as a whole:
 - (A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;
 - (B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
 - (C) is utterly without redeeming social value for minors.
- (b) A person commits an offense if, knowing that the material is harmful:
 - (1) and knowing the person is a minor, he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material:
 - (2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or
 - (3) he hires, employs, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(1) or
 (b)(2) of this section.
- (c) It is a defense to prosecution under this section that:
 - (1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or
 - (2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.
- (d) An offense under this section is a Class A misdemeanor unless it is committed under Subsection (b)(3) of this section in which event it is a felony of the third degree.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.]

§ 43.25. Sexual Performance By a Child

- (a) In this section:
 - (1) "Sexual performance" means any performance or part thereof that includes sexual conduct by a child younger than 17 years of age.
 - (2) "Obscene sexual performance" means any performance that includes sexual conduct by a child younger than 17 years of age of any material that is obscene, as that term is defined by Section 43.21 of this code.
 - (3) "Sexual conduct" means netual or simulated sexual intercourse, deviate sexual inter-

- sociation as its or lead exhibition of the geni-
- ("Feriormance" means any play, motion reaction that is exhibited before an audience.
- (E) I'm mais to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disceminate, present, exhibit, or advertise or to offer rughe to do any of the above.
- "Simulated" means the explicit depiction of social conduct that creates the appearance of attual sexual conduct and during which the persons engaging in the conduct exhibit any uncovered portion of the breasts, genitals, or
- 17, "Deviate sexual intercourse" has the The ring defined by Section 43.01 of this code.
- Se lo-masochistic abuse" has the meaning define liby Section 43.24 of this code.
- ic A , 2 so a committee an effense if, knowing the thurston and content there i, he employs, authofiret, it is a set a child your ger than 11 years of age I aguit in a sexual performance. A parent or tia ... han or custodian of a child younger than If years of age commits an offense if he consents to the participation by the child in a sexual perform-SPCA
- (c) An offense under Subsection (b) of this section is a felony of the second degree.
- (d) A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes an obscene performance that socialise is rail or high py a child younger than 17
- (e A proun commits an offense if, knowing the standate, and emitent of the material, he produces, TO IN ME IT IN DIS a performance that includes eta. In a lant by a child pranger than 17 years of
- off An offered under Subsection (d) or (e) of this so it is a filting of the third terrie.
- age. It is the attirmative deferre to a procession - the this section that the defendant, in good fully, This is the believed that the person who engaged in the serial conduct was 17 years of age or older.
- the Anith Comes relesting for the purposes of this section of intermine whether rightly who partic-For illing and cocalies was younger than 17 years if the the energy may make this determine-With the following metaldic
 - of each not inspection of the child.
 - and in the court of the few engineers in the co in the mother was the shift cap distribution

- (3) oral testimony by a witness to the sexual performance as to the age of the child based on the child's appearance at the time;
- (4) expert medical testimony based on the appearance of the child engaging in the sexual performance: or
- (5) any other method authorized by law or by the rules of evidence at common law.
- [Added by Acts 1977, 65th Leg., p. 1035, ch. 381, § 1, eff. June 10, 1977. Amended by Acts 1979, 66th Leg., p. 1976, ch. 779, § 1, eff. Sept. 1, 1979.]
- Section 2 of the 1979 amendatory act provided.

 "This Act applies only to offenses committed on or after its effective date. A criminal action for an offense committed before this Act's effective date is governed by the law in existence when the offense was committed, and Section 43.25. Penal Code, as in existence before the effective date of this Act, is continued in effect for this purpose as if this Act were not in effect. For the purpose of this section an offense is committed before the effect.

- (1) Wherein any fighting between men or animals or birds shall be conducted; or,
- (2) Wherein any intoxicating liquors are kept for unlawful use, sale or distribution; or,
 - (3) Where vagrants resort; and

Every act unlawfully done and every omission to perform a duty, which act or omission

- (1) Shall annoy, injure or endanger the safety, health, comfort, or repose of any considerable number of persons; or,
 - (2) Shall offend public decency; or,
- (3) Shall unlawfully interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a lake, navigable river, bay, stream, canal or basin, or a public park, square, street, alley or highway; or,

(4) Shall in any way render a considerable number of

persons insecure in life or the use of property;

Shall be a public nuisance. [1971 ex.s. c 280 § 22; 1909 c 249 § 248; 1895 c 14 § 1; Code 1881 § 1246; RRS § 2500.]

Severability—Construction—1971 ex.s. c 280: "If any provision of this 1971 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected: Provided, That should provisions of this 1971 amendatory act pertaining to the playing of bingo, or holding raffles, permitting the operation of amusement games be held invalid or unconstitutional by the supreme court of the state of Washington as being violative of Article II, section 24, of the Constitution of the state of Washington, then the provisions hereof relating to each such item as aforesaid specifically declared invalid or unconstitutional by such court shall remain inoperative unless and until the qualified electors of this state shall approve an amendment to Article II, section 24, of the Constitution which may remove any constitutional restrictions against the legislature enacting such laws." [1971 ex.s. c 280 § 21.]

Devices simulating traffic control signs declared public nuisance: RCW 47.36.180.

Highway obstructions: Chapter 47.32 RCW.

Navigation, obstructing: Chapter 88.28 RCW.

Parimutuel betting on horse races permitted: RCW 67.16.060.

9.66.020 Unequal damage. An act which affects a considerable number of persons in any of the ways specified in RCW 9.66.010 is not less a public nuisance because the extent of the damage is unequal. [1909 c 249 § 249; Code 1881 § 1236; 1875 p 79 § 2; RRS § 2501.]

9.66.030 Maintaining or permitting nuisance. Every person who shall commit or maintain a public nuisance, for which no special punishment is prescribed; or who shall wilfully omit or refuse to perform any legal duty relating to the removal of such nuisance; and every person who shall let, or permit to be used, any building or boat, or portion thereof, knowing that it is intended to be, or is being used, for committing or maintaining any such nuisance, shall be guilty of a misdemeanor. [1909 c 249 § 250; Code 1881 § 1248; 1875 p 81 § 14; RRS § 2502.]

9.66.040 Abatement of nuisance. Any court or magistrate before whom there may be pending any proceeding for a violation of RCW 9.66.030, shall, in addition to any fine or other punishment which it may impose for [Title 9 RCW—p 52]

such violation, order such nuisance abated, and all property unlawfully used in the maintenance thereof destroyed by the sheriff at the cost of the defendant: *Provided*, That if the conviction was had in a justice court, the justice of the peace shall not issue the order and warrant of abatement, but on application therefor, shall transfer the cause to the superior court which shall proceed to try the issue of abatement in the same manner as if the action had been originally commenced therein. [1957 c 45 § 4; 1909 c 249 § 251; Code 1881 §§ 1244, 1245; 1875 p 80 §§ 10, 11; RRS § 2503.]

Jurisdiction to abate a nuisance: State Constitution Art. 4 § 6 (Amendment 28).

9.66.050 Deposit of unwholesome substance. Every person who shall deposit, leave or keep, on or near a highway or route of public travel, on land or water, any unwholesome substance; or who shall establish, maintain or carry on, upon or near a highway or route of public travel, on land or water, any business, trade or manufacture which is noisome or detrimental to the public health; or who shall deposit or cast into any lake, creek or river, wholly or partly in this state, the offal from or the dead body of any animal, shall be guilty of a gross misdemeanor. [1909 c 249 § 285; RRS § 2537.]

Discharging ballast: RCW 88.28.060.

Disposal of dead animals: Chapter 16.68 RCW. Filth removal: RCW 70.20.160, 70.20.170.

Water pollution: Chapter 35.88 RCW, RCW 70.54.010 through 70-

.54.030, chapter 90.48 RCW.

Chapter 9.68 OBSCENITY AND PORNOGRAPHY

Sections	
9.68.015	Obscene literature, shows, etc.—Exemptions.
9.68.030	Indecent articles, etc.
9.68.050	"Erotic material"——Definitions.
9.68.060	"Erotic material"——Determination by court——Labeling——Penalties.
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9.68.090	Civil liability of wholesaler or wholesaler-distributor.
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9.68.120	Provisions of RCW 9.68.050 through 9.68.120 exclusive.
9.68.130	"Sexually explicit material"——Defined——Unlawful display.
9.68.140	Promoting pornography——Class C felony——Penalties.

Immoral dances prohibited: RCW 67.12.040, 67.12.070.

Injunctions, obscene materials: Chapter 7.42 RCW.

Public indecency: Chapter 9A.88 RCW.

Sufficiency of indictment or information, obscene literature: RCW 10.37.130.

Telephone calls using obscene language: RCW 9.61.230 through 9.61.250.

9.68.015 Obscene literature, shows, etc.—Exemptions. Nothing in *this act shall apply to the circulation of any such material by any recognized historical society or museum, the state law library, any county law library,

(1983 Ed.)

the state library, the public library, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision. [1959 c 260 § 2.1]

*Reviser's note: "this act" [1959 c 260] consists of RCW 9.68.015 and the amendments to RCW 9.68.010; that section was later repealed by 1982 c 184 § 11.

9.68.030 Indecent articles, etc. Every person who shall expose for sale, loan or distribution, any instrument or article, or any drug or medicine, for causing unlawful abortion; or shall write, print, distribute or exhibit any card, circular, pamphlet, advertisement or notice of any kind, stating when, where, how or of whom such article or medicine can be obtained, shall be guilty of a misdemeanor. [1971 ex.s. c 185 § 2; 1909 c 249 § 208; RRS § 2460.]

Advertising cures of venereal diseases: RCW 9.04.030. Manufacture or sale of means of abortion: RCW 9.02.030.

9.68.050 "Erotic material"—Definitions. For the purposes of RCW 9.68.050 through 9.68.120:

(1) "Minor" means any person under the age of eighteen vears:

- (2) "Erotic material" means printed material, photographs, pictures, motion pictures, and other material the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value;
- (3) "Person" means any individual, corporation, or other organization:
- (4) "Dealers", "distributors", and "exhibitors" mean persons engaged in the distribution, sale, or exhibition of printed material, photographs, pictures, or motion pictures. [1969 ex.s. c 256 § 13.]

Severability—1969 ex.s. c 256: 'If any provision of this 1969 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provisions to other persons or circumstances, is not affected." [1969 ex.s. c 256 § 21.1

9.68.060 "Erotic material" —— Determination by court—Labeling—Penalties. (1) When it appears that material which may be deemed erotic is being sold. distributed, or exhibited in this state, the prosecuting attorney of the county in which the sale, distribution, or exhibition is taking place may apply to the superior court for a hearing to determine the character of the material with respect to whether it is erotic material.

- (2) Notice of the hearing shall immediately be served upon the dealer, distributor, or exhibitor selling or otherwise distributing or exhibiting the alleged erotic material. The superior court shall hold a hearing not later than five days from the service of notice to determine whether the subject matter is erotic material within the meaning of RCW 9.68.050.
- (3) If the superior court rules that the subject material is erotic material, then, following such adjudication: (1983 Ed)

- (a) If the subject material is written or printed, the court shall issue an order requiring that an "adults only" label be placed on the publication, if such publication is going to continue to be distributed. Whenever the superior court orders a publication to have an "adults only" label placed thereon, such label shall be impressed on the front cover of all copies of such erotic publication sold or otherwise distributed in the state of Washington. Such labels shall be in forty-eight point bold face type located in a conspicuous place on the front cover of the publication. All dealers and distributors are hereby prohibited from displaying erotic publications in their store windows, on outside newsstands on public thoroughfares, or in any other manner so as to make them readily accessible to minors.
- (b) If the subject material is a motion picture, the court shall issue an order requiring that such motion picture shall be labeled "adults only". The exhibitor shall prominently display a sign saying "adults only" at the place of exhibition, and any advertising of said motion picture shall contain a statement that it is for adults only. Such exhibitor shall also display a sign at the place where admission tickets are sold stating that it is unlawful for minors to misrepresent their age.

(c) Failure to comply with a court order issued under the provisions of this section shall subject the dealer. distributor, or exhibitor to contempt proceedings.

- (d) Any person who, after the court determines material to be erotic, sells, distributes, or exhibits the erotic material to a minor shall be guilty of violating RCW 9.68.050 through 9.68.120, such violation to carry the following penalties:
- (i) For the first offense a misdemeanor and upon conviction shall be fined not more than five hundred dollars. or imprisoned in the county jail not more than six months:
- (ii) For the second offense a gross misdemeanor and upon conviction shall be fined not more than one thousand dollars, or imprisoned not more than one year;
- (iii) For all subsequent offenses a felony and upon conviction shall be fined not more than five thousand dollars, or imprisoned not less than one year. [1969 ex.s. c 256 § 14.]

Severability-1969 ex.s. c 256: See note following RCW 9.68.050.

9.68.070 Prosecution for violation of RCW 9.68--Defense. In any prosecution for violation of RCW 9.68.060, it shall be a defense that:

- (1) If the violation pertains to a motion picture, the minor was accompanied by a parent, parent's spouse, or
- (2) Such minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or an apparently official document purporting to establish such minor was over the age of eighteen years; or
- (3) Such minor was accompanied by a person who represented himself to be a parent, or the spouse of a parent, or a guardian of such minor, and the defendant in good faith relied upon such representation. [1969 ex.s. c 256 § 15.]

Severability——1969 ex.s. c 256: See note following RCW 9.68.050.

- 9.68.080 Unlawful acts. (1) It shall be unlawful for any minor to misrepresent his true age or his true status as the child, stepchild or ward of a person accompanying him, for the purpose of purchasing or obtaining access to any material described in RCW 9.68.050.
- (2) It shall be unlawful for any person accompanying such minor to misrepresent his true status as parent, spouse of a parent or guardian of any minor for the purpose of enabling such minor to purchase or obtain access to material described in RCW 9.68.050. [1969 ex.s. c 256 § 16.]

Severability——1969 ex.s. c 256: See note following RCW 9.68.050.

9.68.090 Civil liability of wholesaler or wholesalerdistributor. No retailer, wholesaler, or exhibitor is to be deprived of service from a wholesaler or wholesalerdistributor of books, magazines, motion pictures or other materials or subjected to loss of his franchise or right to deal or exhibit as a result of his attempts to comply with this statute. Any publisher, distributor, or other person, or combination of such persons, which withdraws or attempts to withdraw a franchise or other right to sell at retail, wholesale or exhibit materials on account of the retailer's, wholesaler's or exhibitor's attempts to comply with RCW 9.68.050 through 9.68.120 shall incur civil liability to such retailer, wholesaler or exhibitor for threefold the actual damages resulting from such withdrawal or attempted withdrawal. [1969 ex.s. c 256 § 17.]

Severability——1969 ex.s. c 256: See note following RCW 9.68.050.

9.68.100 Exceptions to provisions of RCW 9.68.050 through 9.68.120. Nothing in RCW 9.68.050 through 9.68.120 shall apply to the circulation of any such material by any recognized historical society or museum, the state law library, any county law library, the state library, the public library, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision. [1969 ex.s. c 256 § 18.]

Severability——1969 ex.s. c 256: See note following RCW 9.68.050.

9.68.110 Motion picture operator or projectionist exempt, when. The provisions of RCW 9.68.050 through 9.68.120 shall not apply to acts done in the scope of his employment by a motion picture operator or projectionist employed by the owner or manager of a theatre or other place for the showing of motion pictures, unless the motion picture operator or projectionist has a financial interest in such theatre or place wherein he is so employed or unless he caused to be performed or exhibited such performance or motion picture without the knowledge and consent of the manager or owner of the theatre or other place of showing. [1969 ex.s. c 256 § 19.]

Severability——1969 ex.s. c 256: See note following RCW 9.68.050. [Title 9 RCW—p 54]

9.68.120 Provisions of RCW **9.68.050** through **9.68.120** exclusive. The provisions of RCW **9.68.050** through **9.68.120** shall be exclusive. [1969 ex.s. c 256 § 20.]

Severability——1969 ex.s. c 256: See note following RCW 9.68.050.

- 9.68.130 "Sexually explicit material"—Defined—Unlawful display. (1) A person is guilty of unlawful display of sexually explicit material if he knowingly exhibits such material on a viewing screen so that the sexually explicit material is easily visible from a public thoroughfare, park or playground or from one or more family dwelling units.
- (2) "Sexually explicit material" as that term is used in this section means any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: *Provided however*, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

(3) Any person who violates subsection (1) of this section shall be guilty of a misdemeanor. [1975 1st ex.s. c 156 § 1.]

9.68.140 Promoting pornography—Class C felony—Penalties. A person who, for profit—making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in RCW 7.48A.010 is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment prescribed for that class of felony, except that upon conviction of promoting pornography the court shall impose a fine of not less than five thousand dollars per count nor more than fifty thousand dollars per count. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state. [1982 c 184 § 8.]

Severability——1982 c 184: See RCW 7.48A.900.

Class C felony——Authorized sentence: RCW 9A.20.020.

Chapter 9.68A CHILD PORNOGRAPHY

Sections	
9.68A.010	Definitions.
9.68A.020	Employing, using, etc., or permitting minor to engage in sexually explicit conduct for commercial use——Class B felony——Defense.
9.68A.030	Sending, bringing into state, possessing, publishing, printing, etc., obscene matter involving minor engaged in sexually explicit conduct——Class C felony.
9.68A.900	Severability——1980 c 53.

Communication with minor for immoral purposes: RCW 9A.44.110.

9.68A.010 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1983 Ed.)

- (1) "Commercial use" means to sell, barter, trade, or otherwise exchange for consideration.
- (2) "Minor" means a person under the age of eighteen years.
- (3) "Photograph" means to make a print, negative, slide, motion picture, videotape, or other mechanically reproduced visual material.
- (4) "Erotic fondling" means the touching of a person's clothed or unclothed genitals, pubic area, buttocks, or a female breast area for the purpose of sexual stimulation or gratification of the audience.
- (5) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (b) Bestiality;
 - (c) Masturbation;
- (d) Sado-masochistic abuse for the purpose of sexual stimulation;
 - (e) Erotic fondling; and
- (f) Lewd exhibition of the male or female genitals or buttocks, or female breasts.
- (6) Visual or printed matter means any film, photograph, negative, slide, motion picture, video tape, book, magazine, or other mechanically reproduced visual or printed material. [1980 c 53 § 1.]

9.68A.020 Employing, using, etc., or permitting minor to engage in sexually explicit conduct for commercial use—Class B felony—Defense. A person who:

- (1) Knowing that such conduct will be photographed or displayed for commercial use, employs, uses, persuades, induces, entices, or coerces a minor to engage in sexually explicit conduct; or
- (2) Being a parent, legal guardian, or person having custody or control of a minor, knowingly permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or displayed for commercial use;

is guilty of a Class B felony.

In a prosecution under this chapter, it is not a defense that the defendant did not know the victim's age: Provided, That it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant reasonably believed the alleged victim to be at least eighteen years of age based on declarations by the alleged victim. [1980 c 53 § 2.]

9.68A.030 Sending, bringing into state, possessing, publishing, printing, etc., obscene matter involving minor engaged in sexually explicit conduct—Class C felony. A person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints with intent to distribute, sell, or exhibit to others for commercial consideration, any visual or printed matter which is obscene, knowing that the production of such matter involves the use of a minor engaged in sexually explicit conduct and that the matter depicts such conduct, is guilty of a Class C felony.

This section does not apply to acts which are an integral part of the exhibition or performance of the motion picture when such acts are done within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist has a financial interest in such theater or place wherein employed or unless the operator or projectionist caused to be performed or exhibited the performance or motion picture without the consent of the manager or owner of the theater or other place of showing. [1980 c 53 § 3.]

9.68A.900 Severability—1980 c 53. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1980 c 53 § 5.]

Chapter 9.69 OBSTRUCTING JUSTICE

Sections

9.69.100

Withholding knowledge of felony involving violence— Penalty.

Labor and industries officer, disobeying subpoena to appear before: RCW 43.22.300.

Legislative hearings, failure to obey subpoena or testify: RCW 44.16.120 through 44.16.150.

Obstructing governmental operation: Chapter 9A.76 RCW. Wills, fraudulently failing to deliver: RCW 11.20.010.

9.69.100 Withholding knowledge of felony involving violence—Penalty. Whoever, having witnessed the actual commission of a felony involving violence or threat of violence or having witnessed preparations for the commission of a felony involving violence or threat of violence, does not as soon as reasonably possible make known his knowledge of such to the prosecuting attorney, police, or other public officials of the state of Washington having jurisdiction over the matter, shall be guilty of a gross misdemeanor: *Provided*, That nothing in this act shall be so construed to affect existing privileged relationships as provided by law. [1970 ex.s. c 49 § 8.]

Reviser's note: "this act" [1970 ex.s. c 49] is codified as RCW 9.48-.010, 9.48.060, 9.69.100, 10.31.030, 10.37.033, 46.61.520, and 72.50.040.

Severability—1970 ex.s. c 49: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1970 ex.s. c 49 § 9.]

Chapter 9.72 PERJURY

Sections

9.72.090 Committal of witness — Detention of documents.

Agricultural co-ops, false statements: RCW 24.32.330.

Banks and trust companies

false swearing in bank or trust company examinations: RCW 30.04.060.

[Title 9 RCW-p 55]

SB 4309 Sexual Exploitation of Children

By Senators Talmadge, Vognild, Hughes and others

Prohibiting the sexual exploitation of children.

The current chapter on child pornography is repealed. In its stead, criminal penalties are established for a range of actions involving sexual exploitation of minors. "Sexual exploitation" is defined as compelling, causing, or allowing a minor to engage in sexually explicit conduct which is then photographed or observed. This conduct is a class B felony if the minor is under 16 years of age and a class C felony if the minor is under 18. Patronizing a prostitute under 18 years of age is a class C felony.

Developing or printing sexually explicit visual materials involving minors under 16 is a class C felony. The sale, financing, or distribution of such materials is a class C felony, while possession is a gross misdemeanor. Procedures for forfeiture of sexually explicit

material, materials used to manufacture them, and moneys received from the sale of such materials are established. Film processors who believe they have received prohibited materials for developing are required to report that fact to law enforcement. Failure to report is a gross misdemeanor.

Communication with a minor under 16 years of age for immoral purposes is a gross misdemeanor unless the person has a previous conviction of any offense involving sexual exploitation of minors, any sex offense, or any family offense. In those cases, communication with a minor for immoral purposes is a class C felony.

Exploited minors are entitled to attorneys' fees if they prevail in a civil action arising out of a violation of the sexual exploitation act.

EFFECTIVE: June 7, 1984



CERTIFICATION OF ENROLLED ENACTMENT

SENATE BILL NO. 4309

Chapter 262, Laws of 1984

48th Legislature Regular Session

EFFECTIVE DATE: June 7, 1984

Passed the Senate January 19, _____19 84

Yeas 48 Nays Q

...19 84 February 17, Passed the House as amended

Yeas 97

Nays 0

2/28/84 - The Senate refused to concur in the House amendment and asked the House to recede. 3/2/84 - The House insisted on its position

Yeas 96 Nays 0 as passed by the Senate and 16000 on the datas beroom to 16000 on the 16000

3/2/84 - The House insisted on its position and asked the Senate for a conference.
3/3/84 - The Senate granted a conference.
3/5/84 - The House adopted the report of the Free Conference Committee and passed the bill as amended by Free Conference
Yeas 96 Nays 0 The Senate and the House of Representatives on the dates bereon set forth. tives on the dates bereon set forth.

Secretary of the Sonat

ENGROSSED SENATE BILL NO. 4309 AS AMENDED BY THE FREE CONFERENCE COMMITTEE

State of Washington 48th Legislature 1984 Regular Session

by Senators Talmadge, Vognild, Hughes, Hemstad, Moore. Hayner, Granlund, Woody and Peterson

Prefiled with the Secretary of the Senate January 6, 1984. Read first time January 9, 1984, and referred to Committee on Judiciary.

- AN ACT Relating to sexual exploitation of children; adding new
- 2 sections to chapter 9.68A RCW; repealing section 1, chapter 53, Laws
- 3 of 1980 and RCW 9.68A.010; repealing section 2, chapter 53, Laws of
- 4 1980 and RCW 9.68A.020; repealing section 3, chapter 53, Laws of 1980
- 5 and RCW 9.68A.030; repealing section 5, chapter 53, Laws of 1980 and
- 6 RCW 9.68A.900; repealing section 9A.88.020, chapter 260, Laws of 1975
- 7 1st ex. sess. and RCW 9A.44.110; and prescribing penalties.
- 8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:
- 9 NEW SECTION. Sec. 1. The legislature finds that the prevention
- 10 of sexual exploitation and abuse of children constitutes a government
- 11 objective of surpassing importance. The care of children is a sacred
- 12 trust and should not be abused by those who seek commercial gain or
- 13 personal gratification based on the exploitation of children.
- 14 The legislature further finds that the protection of children
- 15 from sexual exploitation can be accomplished without infringing on a
- 16 constitutionally protected activity. The definition of "sexually
- 17 explicit conduct" and other operative definitions demarcate a line
- 18 between protected and prohibited conduct and should not inhibit
- 19 legitimate scientific, medical, or educational activities.
- NEW SECTION. Sec. 2. Unless the context clearly indicates
- 21 otherwise, the definitions in this section apply throughout the
- 22 chapter.
- 23 (1) To "photograph" means to make a print, negative, slide,
- 24 motion picture, or videotape. A "photograph" means any tangible item
- 25 produced by photographing.
- 26 (2) "Visual or printed matter" means any photograph or other
- 27 material that contains a reproduction of a photograph.
- 28 (3) "Sexually explicit conduct" means actual or simulated:

- l (a) Sexual intercourse, including genital-genital, oral-genital,
- 2 anal-genital, or oral-anal, whether between persons of the same or
- 3 opposite sex or between humans and animals:
- (b) Penetration of the vagina or rectum by any object;
- 5 (c) Masturbation, for the purpose of sexual stimulation of the
- 6 viewer;
- 7 (d) Sadomasochistic abuse for the purpose of sexual stimulation
- 8 of the viewer;
- 9 (e) Exhibition of the genitals or unclothed pubic or rectal areas
- 10 of any minor for the purpose of sexual stimulation of the viewer;
- 11 (f) Defecation or urination for the purpose of sexual stimulation
- 12 of the viewer; and
- (g) Touching of a person's clothed or unclothed genitals, pubic
- 14 area, buttocks, or breast area for the purpose of sexual stimulation
- 15 of the viewer.
- 16 NEW SECTION. Sec. 3. (1) A person is guilty of sexual
- 17 exploitation of a minor if the person:
- 18 (a) Compels a minor by threat or force to engage in sexually
- 19 explicit conduct, knowing that such conduct will be photographed or
- 20 part of a live performance;
- 21 (b) Aids or causes a minor to engage in sexually explicit
- 22 conduct, knowing that such conduct will be photographed or part of a
- 23 live performance; or
- 24 (c) Being a parent, legal guardian, or person having custody or
- 25 control of a minor, permits the minor to engage in sexually explicit
- 26 conduct, knowing that the conduct will be photographed or part of a
- 27 live performance.
- 28 (2) Sexual exploitation of a minor is:
- 29 (a) A class B felony punishable under chapter 9A.20 RCW if the
- 30 minor exploited is less than sixteen years old at the time of the
- 31 offense; and
- 32 (b) A class C felony punishable under chapter 9A.20 RCW if the
- 33 minor exploited is at least sixteen years old but less than eighteen
- 34 years old at the time of the offense.
- 35 NEW SECTION. Sec. 4. A person who:

- 1 1 Knowingly develops, duplicates, publishes, prints,
- 2 disseminates, exchanges, finances, attempts to finance, or sells any
- 3 visual or printed matter that depicts a minor engaged in an act of
- 4 sexually explicit conduct; or
- 5 (2) Possesses with intent to develop, duplicate publish, print,
- 6 disseminate, exchange, or sell any visual or printed matter that
- 7 depicts a minor engaged in an act of sexually explicit conduct
- 8 is quilty of a class C felony punishable under chapter 9A.20 RCW.
- 9 (3) As used in this section, "minor" means a person under sixteen
- 10 years of age.
- 11 NEW SECTION. Sec. 5. (1) A person who knowingly seeds or causes
- 12 to be sent, or brings or causes to be brought, into this state for
- 13 sale or distribution, any visual or printed matter that depicts a
- 14 minor engaged in sexually explicit conduct is guitty of a class C
- 15 felony punishable under chapter 9A.20 RCW.
- 16 (2) As used in this section, "minor" means a person under sixteen
- 17 years of age.
- 18 NEW SECTION. Sec. 6. (1) A person who knowingly possesses
- 19 visual or printed matter depicting a minor engaged in sexually
- 20 explicit conduct is guilty of a gross misdemeanor.
- (2) As used in this section, "minor" means a person under sixteen
- 22 years of age.
- 23 NEW SECTION. Sec. 7. (1) A person who, in the course of
- 24 processing or producing visual or printed matter either privately or
- 25 commercially, has reasonable cause to believe that the visual or
- 26 printed matter submitted for processing or producing depices a minor
- 27 engaged in sexually explicit conduct shall immediately report such
- 28 incident, or cause a report to be made, to the proper law enforcement
- 29 agency. Persons failing to do so are guilty of a gross misdemeanor.
- 30 (2) As used in this section, "minor" means a person under sixteen
- 31 years of age.
- 32 HEW SECTION. Sec. 8. (1) A person who communicates with a minor
- 33 for immoral purposes is quilty of a gross misdemeanor, unless that
- 34 person has previously been convicted of a felony sexual offense under

- . chapter 9.68A. SA.44, or 9A.64 RCW or of any other felony sexual
- 2 offense in this or any other state, in which case the person is
- 3 guilty of a class C felony punishable under chapter 9A.20 RCW.
- 4 (2) As used in this section, "minor" means a person under sixteen 5 years of age.
- 6 NEW SECTION. Sec. 9. (1) A person is guilty of patronizing a
- 7 juvenile prostitute if that person engages or agrees or offers to
- 8 engage in sexual conduct with a minor in return for a fee, and is
- 9 guilty of a class C felony punishable under chapter 9A.20 RCW.
- 10 (2) As used in this section, "minor" means a person under
- 11 eighteen years of age.
- NEW SECTION. Sec. 10. (1) In a prosecution under section 3 of
- 13 this act, it is not a defense that the defendant was involved in
- 14 activities of law enforcement and prosecution agencies in the
- 15 investigation and prosecution of criminal offenses. Law enforcement
- 16 and prosecution agencies shall not employ minors to aid in the
- 17 investigation of a violation of section 8 or 9 of this act. This
- 18 chapter does not apply to individual case treatment in a recognized
- 19 medical facility or individual case treatment by a psychiatrist or
- 20 psychologist licensed under Title 18 RCW, or to lawful conduct
- 21 between spouses.
- 22 (2) In a prosecution under section 4, 5, 6, or 7 of this act, it
- 23 is not a defense that the defendant did not know the age of the child
- 24 depicted in the visual or printed matter: PROVIDED, That it is a
- 25 defense, which the defendant must prove by a preponderance of the
- 26 evidence, that at the time of the offense the defendant was not in
- 27 possession of any facts on the basis of which he or she should
- 28 reasonably have known that the person depicted was a minor.
- 29 (3) In a prosecution under section 3 or 9 of this act, it is not
- 30 a defense that the defendant did not know the alleged victim's age:
- 31 PROVIDED, That it is a defense, which the defendant must prove by a
- 32 preponderance of the evidence, that at the time of the offense, the
- 33 defendant reasonably believed the alleged victim to be at least
- 34 eighteen years of age based on declarations by the alleged victim.
- 35 (4) In a prosecution under section 4, 5, or 8 of this act, it is

- I not a defense that the defendant did not know the alleged victim's
- 2 age: PROVIDED, That it is a defense, which the defendant must prove
- 3 by a preponderance of the evidence, that at the time of the offense,
- 4 the defendant reasonably believed the alleged victim to be at least
- 5 sixteen years of age based on declarations by the alleged victim.
- 6 (5) In a prosecution under section 4, 5, or 6 of this act, the
- 7 state is not required to establish the identity of the alleged
- 8 victim
- 9 NEW SECTION. Sec. 11. The following are subject to seizure and
- 10 forfeiture:
- (1) All visual or printed matter that depicts a minor engaged in
- 12 sexually explicit conduct.
- (2) All raw materials, equipment, and other tangible personal
- 14 property of any kind used or intended to be used to manufacture or
- 15 process any visual or printed matter that depicts a minor engaged in
- 16 sexually explicit conduct, and all conveyances, including aircraft,
- 17 vehicles, or vessels that are used or intended for use to transport,
- 18 or in any manner to facilitate the transportation cf, visual or
- 19 printed matter in violation of section 4 or 5 of this act, but:
- 20 (a) No conveyance used by any person as a common carrier in the
- 21 transaction of business as a common carrier is subject to forfeiture
- 22 under this section unless it appears that the owner or other person
- 23 in charge of the conveyance is a consenting party or privy to a
- 24 violation of this chapter;
- 25 (b) No property is subject to forfeiture under this section by
- 26 reason of any act or omission established by the owner of the
- 27 property to have been committed or omitted without the owner's
- 28 knowledge or consent;
- 29 (c) A forfeiture of property encumbered by a bona fide security
- 30 interest is subject to the interest of the secured party if the
- 31 secured party neither had knowledge of nor consented to the act or
- 32 omission; and
- 33 (d) When the owner of a conveyance has been arrested under this
- 34 chapter the conveyance may not be subject to forfeiture unless it is
- 35 seized or process is issued for its seizure within ten days of the
- 36 owner's arrest.

Sec. ..

- 3. All personal property, moneys, negotiable instruments,
- 2 securities, or other tangible or intangible property furnished or
- I intended to be furnished by any person in exchange for visual or
- 4 printed matter depicting a minor engaged in sexually explicit
- 5 conduct, or constituting proceeds traceable to any violation of this
- 6 chapter.
- 7 (4) Property subject to forfeiture under this chapter may be
- 6 seized by any law enforcement officer of this state upon process
- 9 issued by any superior court having jurisdiction over the property.
- 10 Seizure without process may be made if:
- 11 (a) The seizure is incident to an arrest or a search under a
- 12 search warrant or an inspection under an administrative inspection
- 13 warrant;
- (b) The property subject to seizure has been the subject of a
- 15 prior judgment in favor of the state in a criminal injunction or
- 16 forfeiture proceeding based upon this chapter;
- 17 (c) A law enforcement officer has probable cause to believe that
- 18 the property is directly or indirectly dangerous to health or safety;
- 19 or
- 20 (d) The law enforcement officer has probable cause to believe
- 21 that the property was used or is intended to be used in violation of
- 22 this chapter.
- 23 (5) In the event of seizure under subsection (4) of this
- 24 section, proceedings for forfeiture shall be deemed commenced by the
- 25 seizure. The law enforcement agency under whose authority the
- 26 seizure was made shall cause notice to be served within fifteen days
- 27 following the seizure on the owner of the property seized and the
- 28 person in charge thereof and any person having any known right or
- 29 interest therein, of the seizure and intended forfeiture of the
- 30 seized property. The notice may be served by any method authorized
- 31 by law or court rule including but not limited to service by
- 32 certified mail with return receipt requested. Service by mail shall
- 33 be deemed complete upon mailing within the fifteen day period
- 34 following the seizure.
- 35 (6) If no person notifies the saizing law enforcement agency in
- 36 writing of the person's claim of ownership or right to possession of

ESB 4309

- 1 seized items within forty-five days of the seizure, the litem seized
- 2 shall be deemed forfeited.
- 3 (7) If any person notifies the seizing law enforcement agency in
- 4 writing of the person's claim of ownership or right to possession of
- 5 seized items within forty-five days of the seizure, the person or
- 6 persons shall be afforded a reasonable opportunity to be heard as to
- 7 the claim or right. The hearing shall be before an administrative
- 8 law judge appointed under chapter 34.12 RCW, except that any person
- 9 asserting a claim or right may remove the matter to a court of
- 10 competent jurisdiction if the aggregate value of the article or
- Il articles involved is more than five hundred dollars. The hearing
- 12 before an administrative law judge and any appeal therefrom shall be
- 13 under Title 34 RCW. In a court hearing between two or more claimants
- 14 to the article or articles involved, the prevailing party shall be
- 15 entitled to a judgment for costs and reasonable attorney's fees. The
- 16 burden of producing evidence shall be upon the person claiming to be
- 17 the lawful owner or the person claiming to have the lawful right to
- 18 possession of the seized items. The seizing law enforcement agency
- 19 shall promptly return the article or articles to the claimant upon a
- 20 determination by the administrative law judge or court that the
- 21 claimant is lawfully entitled to possession thereof of the seized
- 22 items.
- 23 (8) If property is sought to be forfaited on the ground that it
- 24 constitutes proceeds traceable to a violation of this chapter, the
- 25 seizing law enforcement agency must prove by a preponderance of the
- 26 evidence that the property constitutes proceeds traceable to a
- 27 violation of this chapter.
- 28 (9) When property is forfeited under this chapter the seizing
- 29 law enforcement agency may:
- 30 (a) Retain it for official use or upon application by any law
- 31 enforcement agency of this state release the property to that agency
- 32 for the exclusive use of enforcing this chapter;
- 33 (b) Sell that which is not required to be destroyed by law and
- 34 which is not harmful to the public. The proceeds and all moneys
- 35 forfeited under this chapter shall be used for payment of all proper
- 36 expenses of the investigation leading to the seizure, including any

- I money delivered to the subject of the investigation by the law
- 2 enforcement agency, and of the proceedings for forfeiture and sale,
- 3 including expenses of seizure, maintenance of customy, advertising,
- 4 actual costs of the prosecuting or city attorney, and court costs.
- 5 Fifty percent of the money remaining after payment of these expenses
- 6 shall be deposited in the criminal justice training account
- 7 established under RCW 43.101.210 which shall be appropriated by law
- 8 to the Washington state criminal justice training commission and
- 9 fifty percent shall be deposited in the general fund of the state,
- 10 county, or city of the seizing law enforcement agency; or
- 11 (c) Request the appropriate sheriff or director of public safety
- 12 to take custody of the property and remove it for disposition in
- 13 accordance with law.
- 14 NEW SECTION. Sec. 12. A minor prevailing in a civil action
- 15 arising from violation of this chapter is entitled to recover the
- 16 costs of the suit, including an award of reasonable attorneys' fees.
- 17 NEW SECTION. Sec. 13. The following acts or parts of acts are
- 18 each repealed:
- 19 (1) Section 1, chapter 53, Laws of 1980 and RCW 9.68A.010;
- 20 (2) Section 2, chapter 53, Laws of 1980 and RCW 9.(8A.020;
- 21 (3) Section 3, chapter 53, Laws of 1980 and RCW 9.68A.030;
- 22 (4) Section 5, chapter 53, Laws of 1980 and RCW 9.68A.900; and
- 23 (5) Section 9A.88.020, chapter 260, Laws of 1975 1st ex. sess.
- 24 and RCW 9A.44.110.
- 25 NEW SECTION. Sec. 14. Sections 1 through 12 of this act are
- 26 each added to chapter 9.68A RCW.
- 27 NEW SECTION. Sec. 15. If any provision of this act or its
- 28 application to any person or circumstance is held invalid, the
- 29 remainder of the act or the application of the provision to other
- 30 persons or circumstances is not affected.

Passed the Senate March 5, 1984.

hn a. Cherberg
President of the Senate.

Passed the House March 5, 1984.

· Made Com

Approved March 28 7 1984

Governor of the State of Washington

FILED

MAR 2 8 1984
SECRETARY OF STATE STATE OF WASHINGTON
3:38

city of Phoenix

ORDINANCE NO. G- 1746

AN ORDINANCE AMENDING THE ZONING ORDINANCE TO AUTHORIZE PURCHASE OR CONDEMNATION OF NONCONFORMING USES; DEFINING AND REGULATING ADULT BOOKSTORES, ADULT LIVE ENTERTAINMENT -- ESTABLISHMENTS AND ADULT THEATRES; AND DECLARING AN EMERGENCY.

· WHEREAS, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas; and

- WHEREAS, special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods: and

WHEREAS, these uses include adult bookstores, adult motion picture theatres, and adult live entertainment establishments; and

WHEREAS, the primary control or regulation is for the purpose of preventing a concentration of these uses in any one area,

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PHOENIX as follows:

SECTION 1. That Appendix A of the City Code, the Zoning Ordinance, is hereby amended as follows:

- A. Amend Section 106, Nonconforming Uses, by the addition of a new subsection D to read as follows:
 - "D. The City Council by ordinance may authorize the acquisition of private property by purchase or condemnation for the removal of nonconforming uses and structures."
- B. Amend Chapter II, Definitions, by the addition of the following definitions:

"Adult Bookstore. An Establishment:

- Having as a substantial portion of its stock in trade, books, magazines and other periodicals depicting, describing or relating to 'specified sexual activities' or which are characterized by their emphasis on matter depicting, describing or relating to 'specified anatomical areas'; or
- Having as a substantial portion of its stock in trade, books, magazines and other periodicals and which excludes all minors from the premises or a section thereof."

"AdultLive Entertainment Establishment:

An establishment which features topless or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers."

"Adult Theatre. An enclosed building or open-air drive-in theatre:

- 1. Regularly used for presenting any film or plate negative, film or plate positive, film or tape designed to be projected on a screen for exhibition, or films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen depicting, describing or relating to 'specified sexual activities' or characterized by an emphasis on matter depicting, describing or relating to 'specified anatomical areas'; or
- 2. Used for presenting any film or plate negative, film or plate positive, film or tape designed to be projected on a screen for exhibition, or films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen and which regularly excludes all minors."

"Specified Sexual Activities:

- Human genitals in a state of sexual stimulation or arousal;
- Acts of human masturbation, sexual intercourse or sodomy;
- Fondling or other erotic touching of human genitals, pubic region, buttock or female breast."

"Specified Anatomical Areas:

- 1. Less than completely and opaquely covered: .
 - (a) Human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
- Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

C. Amend Section 416-C, Permitted Uses, by amending the following permitted uses to read as follows:

"Booksellers and Rentals, except adult bookstores.

Magazines, Retail Sales, except adult bookstores."

D. Amend Section 417-B, Permitted Uses, by the addition of the following permitted uses in proper alphabetical sequence to read as follows:

> "Adult Bookstore, Adult Theatre, Adult Live Entertainment Establishment, subject to the following conditions of limitations:

- None of the above listed uses may be located. within 1000 feet of any use in the same category or any other use listed above; and
- 2. None of the above listed uses may be located within 500 feet of a public or private school accredited by the State of Arizona or any of the following use districts: RE-43, RE-35, RE-24, R1-18, R1-14, R1-10, R1-8, R1-6, R-3, R-4, R-4A, R-5, S-1, PAD-1 through PAD-15; unless a petition requesting waiver of this requirement signed by fifty-one (51) percent of those persons residing within a 500-foot radius of the proposed location is received and verified by the Planning Director, in which case the City Council may waive this requirement.
- 3. Live Entertainment Subject to a Use Permit.
- 4. These provisions shall not be construed as permitting any use or act which is otherwise prohibited or made punishable by law."

SECTION 2. WHEREAS, the immediate operation of the provisions of this ordinance is necessary for the preservation of the public peace, health and safety, an EMERGENCY is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage by the Council as required by the City Charter and is hereby exempted from the referendum clause of said Charter.

		PASSED	by	the	Council	of	the	City	of	Phoenix	this	8
day	of			MOVENS	ER ,	197	77.					

			MARGARET T. HANCE
ATTEST:			MAYOR
מאסס	IA CULBERTSON	City	Clerk
APPROVED	AS TO FORM:	AC	nn:G
	L. VERDE RHUE	City	Attorney
REVIEWED	BY:		
	MARVIN A. ANDREWS	City	Manager

ORDINANCE NO. G- 1746

AM ORDINANCE AMENDING THE ZONING ORDINANCE
TO AUTHORIZE PURCHASE OR CONDEMNATION OF
NONCONFORMING USES; DEFINING AND REGULATING
ADULT BOOKSTORES, ADULT LIVE ENTERTAINMENT
--ESTABLISHMENTS AND ADULT THEATRES; AND
DECLARING AN EMERGENCY.

WHEREAS, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas; and

- WHEREAS, special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods; and

WHEREAS, these uses include adult bookstores, adult motion picture theatres, and adult live entertainment establishments; and

WHEREAS, the primary control or regulation is for the purpose of preventing a concentration of these uses in any one area,

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PHOENIX as follows:

SECTION 1. That Appendix A of the City Code, the Zoning Ordinance, is hereby amended as follows:

- A. Amend Section 106, Nonconforming Uses, by the addition of a new subsection D to read as follows:
 - "D. The City Council by ordinance may authorize the acquisition of private property by purchase or condemnation for the removal of nonconforming uses and structures."
- B. Amend Chapter II, Definitions, by the addition of the following definitions:

"Adult Bookstore, An Establishment:

- Having as a substantial portion of its stock in trade, books, magazines and other periodicals depicting, describing or relating to 'specified sexual activities' or which are characterized by their emphasis on matter depicting, describing or relating to 'specified anatomical areas'; or
- Having as a substantial portion of its stock in trade, books, magazines and other periodicals and which excludes all minors from the premises or a section thereof."

"AdultLive Entertainment Establishment:

An establishment which features topless or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers."

"Adult Theatre. An enclosed building or open-air drive-in theatre:

- 1. Regularly used for presenting any film or plate negative, film or plate positive, film or tape designed to be projected on a screen for exhibition, or films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen depicting, describing or relating to 'specified sexual activities' or characterized by an emphasis on matter depicting, describing or relating to 'specified anatomical areas'; or
- 2. Used for presenting any film or plate negative, film or plate positive, film or tape designed to be projected on a screen for exhibition, or films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen and which regularly excludes all minors."

"Specified Sexual Activities:

- Human genitals in a state of sexual stimulation or arousal;
- Acts of human masturbation, sexual intercourse or sodomy; '
- 3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast."

"Specified Anatomical Areas:

- 1. Less than completely and opaquely covered:
 - (a) Human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
- 2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

Z. Americ Section -10-0 Fermioned less on among the following resmitted uses to be a solicys

"Booksellers and Parthis except coult bookstores

Pagarires latti Sales entert artic trocstores

D. Amend Section -17-3 Resulting Uses of the district of the following negations uses in opposer alonebethosi secuence to respons follows

> Lacilt Bookstore acult Treatme acult Lime Enternainment Establishment surject to the following occultuous or Limitations

- 1 Note of the coope listed uses that be located within 1000 feet of any use in the same category or any other use listed above and
- District of the anome listed uses member located vithin 500 feet of a rubble or trimate school actrecited on the State of arreons or any of the following use abstracts RE-0 RE-35, RE-11 RI-18 RI-1 RI-18 R
- 1 Tame Internalization Subject to a Use Permit.
- Trese provisions shall not be construed as permitting any use or not which is otherwise promotions or made purishable by law."

SECTION 1 VERSIAL the immediate operation of the provisions of this ordinance is necessary for the preservation of the public peace health and safety an EMERGENCY is hereby declared to emist, and this ordinance shall be in full force and effect from and after its passage by the Council as required by the City Champer and is hereby emempted from the reference clause of said Charter

PANCED by the Council of the City of Phoenix this 8 day of _____ NO 1819 ___ 1977

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STATUTE

EMENT ON § 14-202.10 April

3 1977 CUMULATIVE SUPPLEMENT

5 14-198

Editor's Note. — The 1971 amendment deleted Brunswick, Camden, Macon and Tyrrell from the list of exempt counties.

The first 1973 amendment deleted Craven and the second 1973 amendment deleted Stanly from the list of exempt counties.

STONES

§ 14-198: Repealed by Session Laws 1975, c. 402.

§ 14-202.1. Taking indecent liberties with children. — (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the

purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is a felony punishable by a-fine, imprisonment for not more than 10 years, or both (1955, c. 764; 1975, c. 779.)

Editor's Note. — The 1975 amendment, effective Oct. 1, 1975, rewrote this section.

This section and § 14-177, etc. -

Sections 14-177 and this section can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Section 14-177 condemns crimes against nature whether committed against adults or children. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied. 279 N.C. 512, 183

S.E 2d 683 (1971).

This section condemns other acts against children than unnatural sexual acts. State v. Copeland, 11 N.C. App. 516, 191 S.E.2d 722 certidened, 279 N.C. 512, 183 S.E.2d 638 (1971).

This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of \$14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 653 (1971).

Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of this section is not a lesser included offense of the crime against nature described in § 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E. 2d 722, cert. denied, 279 N.C. 512, 183 S.E. 2d 683 (1971).

Applied in State v. Wells, 31 N.C. App. 736,

230 S.E.2d 437 (1976).

§§ 14-202.2 to 14-202.9: Reserved for future codification purposes.

ARTICLE 26A.

Adult Establishments.

§ 14-202.10. Definitions. — As used in this Article:

- (1) "Adult bookstore" means a bookstore having as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.
- (2) "Adult establishment" means an adult bookstore, adult motion picture theater, adult mini motion picture theater, or a massage business as defined in this section.
- (3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

393

(4) "Adult mini motion picture theater" means an enclosed building with a capacity for less than 50 persons used for presenting motion pictures. a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing,

stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage

parlors.
(7) "Sexually oriented devices" means without limitation any artificial or simulated specified anatomical area or other device or paraphenalia that is designed in whole or part for specified sexual activities.
(8) "Specified anatomical areas" means:

a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or

b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(9) "Specified sexual activities" means:

a. Human genitals in a state of sexual stimulation or arousal;

b. Acts of human masturbation, sexual intercourse or sodomy; or c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts. (1977, c. 987, s. 1.)

Editor's Note. - Session Laws 1977, c. 937, s. 2, makes this Article effective Jan. 1, 1978.

§ 14-202.11. Restrictions as to adult establishments. — No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure, or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment. (1977, c. 987, s. 1.)

§ 14-202.12. Violations; penaltics. — Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three hundred dollars (\$300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars (\$500.00), or both, in the discretion of the court. (1977, c. 987, s. 1.)

ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.

Applied in State v. Bethea, 9 N.C. App. 544, Quoted in State v. Demott, 26 N.C. App. 14. 176 S.E.2d 904 (1970); Brown v. Brannon, 399 F. 214 S.E.2d 781 (1975). Supp. 133 (M.D.N.C. 1975).

HART BOOK STORES, INC., et al., petitioners, v. Rufus EDMISTEN, et al. No. 79-1352.

Facts and opinion, D.C., 450 F.Supp. 904; 612 F.2d 821.

June 16, 1980. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Mr. Justice BRENNAN and Mr. Justice MARSHALL would grant the petition for certiorari, reverse the judgment of the Court of Appeals and reinstate the judgments of July 21, 1978 entered in the United States District Court for the Western District of North Carolina and of April 21, 1978 entered in the United States District Court for the Eastern District of North Carolina declaring unconstitutional N.C. G.S. Sections 14-202.10 to .12.

100 SCT. 3028

HART BOOK STORES, INC. v. EDMISTEN

groups . . . to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves." 91 Cong. Rec. 1485 (1945) (remarks of Sen. O'Mahoney).

I respectfully dissent.



HART BOOK STORES, INC.; Raleigh Books, Inc.; Tri-State News, Inc.; Ronald Mothershead, d/b/a R. and M. Adult Book Store; Jesse F. Frye, Jr., d/b/a L. & J. News Stand; Larry Gene Moore, d/b/a E. & M. EnterPrises; Thomas Page, d/b/a Player's Book Store; Joseph Raymond MC Broom, d/b/a M Distributors; Camera's Eye, Inc., a North Carolina Corporation, Appellees,

Rufus EDMISTEN, Attorney General of North Carolina; Randolph Riley, District Attorney for 10th Judicial District; . E. Raymond Alexander, District Attorney for 18th Judicial District; Donald K. Tisdale, District Attorney for 21st Judi--cial District; Donald Jacobs, District Attorney for 8th Judicial District; Dan K. Edwards, District Attorney for 14th Judicial District; H. W. Zimmerman, District Attorney for 22nd Judicial District; Donald Greene, District Attorney for 25th Judicial District; James C. Roberts, District Attorney for 19th Judicial District, W. A. Allen, Sheriff, Durham County, North Carolina; T. B. Seagroves, Chief of Police, City of Durham, North Carolina; The State of North Carolina; William H. Andrews, District Attorney for 4th Judicial District; William Allen Cobb, District Attorney for 5th Judicial District; Edward W. Grannis, Jr., District Attorney for 12th Judicial District; Wade Barber, Jr., District Attorney for 15(b) Judicial District; C. D. Knight, Sheriff, Orange County, North Carolina; Herman Stone, Chief of Police, City of Chapel Hill, North Carolina, Appellants.

U. T. INCORPORATED, a Georgia Corporation, d/b/a Camera's Eye Bookstore; and Mind's Eye, Inc., a North Carolina Corporation, d/b/a as Mind's Eye and Imperial Book Store, Appellees,

Rufus EDMISTEN, Attorney General of the State of North Carolina; Joseph Brown, District Attorney of the Twenty-Seventh Judicial District and Individually; C. C. Elmore, Chief of Police of City of Gastonia and Individually; Peter Gilchrist, District Attorney for the Twenty-Sixth Judicial District and Individually; Donald Greene, District Attorney for the Twenty-Fifth Judicial District and Individually, Appellants.

Nos. 78-1461, 78-1706.

United States Court of Appeals, Fourth Circuit.

Argued April 4, 1979.
Decided Dec. 4, 1979.

North Carolina appealed from a judgment of the United States District Court for the Eastern District of North Carolina, Franklin T. Dupree, Jr., Chief Judge, and a judgment of the United States District Court for the Western District of North Carolina, James B. McMillan, J., 450 F.Supp. 904, holding unconstitutional a North Carolina statute providing that a single building that contains an adult bookstore, adult theater, an adult minitheater,

massage parlor, or sexual device wares cannot contain a second such adult establishment. The Court of Appeals, James Dickson Phillips, Circuit Judge, held that the statute did not violate the First Amendment, did not deny equal protection, was not unconstitutionally vague, and did not violate the constitutionally protected right of privacy.

Reversed.

1. Constitutional Law \Leftrightarrow 90.1(4) Obscenity \Leftrightarrow 2

North Carolina statute providing that single building that contains adult bookstore, adult theater, and adult minitheater, massage parlor, or sexual device wares cannot contain a second such adult establishment did not violate First Amendment. G.S.N.C. §§ 14-202.10 to 14-202.12; U.S.C. A.Const. Amend. 1.

2. Constitutional Law ⇔228.2 Obscenity ⇔2

North Carolina statute providing that single building that contains adult bookstore, adult theater, adult minitheater, massage parlor, or sexual device wares cannot contain second such adult establishment did not deny equal protection. G.S.N.C. §§ 14—202.10 to 14—202.12; U.S.C.A.Const. Amend. 14.

3. Constitutional Law = 42.2(1)

Proprietors of adult bookstores did not have standing to assert unconstitutional vagueness of North Carolina statute providing that single building that contains adult bookstore, adult theater, adult minitheater, massage parlor, or sexual device wares cannot contain second such adult establishment, in that their stores were clearly within statutory terms. G.S.N.C. §§ 14–202.10 to 14–202.12; U.S.C.A.Const. Amend. 14.

4. Obscenity == 2

. North Carolina statute providing that single building that contains adult book-.

store, adult theater, adult minitheater, massage parlor, or sexual device wares cannot contain second such adult establishment was not unconstitutionally vague. G.S.N.C. §§ 14-202.10 to 14-202.12; U.S.C.A.Const. Amend. 14.

5. Constitutional Law ←82(10) Obscenity ←2

North Carolina statute providing that single building that contains adult bookstore, adult theater, adult minitheater, massage parlor, or sexual device wares cannot contain second such adult establishment did not violate constitutional right of privacy. G.S.N.C. §§ 14–202.10 to 14–202.12; U.S.C. A.Const. Amend. 14.

Arnold Loewy, Professor of Law, University of North Carolina, Chapel Hill, N. C. (Rufus L. Edmisten, Atty. Gen., Marvin Schiller, Asst. Atty. Gen., Raleigh, N. C., on brief), for appellants.

Michael K. Curtis, Greensboro, N. C. (Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, N. C., Thomas F. Loflin, III, Loflin, Loflin, Galloway, Leary & Acker, Durham, N. C., on brief), for appellees.

Before JEAN S. BREITENSTEIN, United States Circuit Judge for the Tenth Circuit, sitting by designation, and WIDENER and PHILLIPS, Circuit Judges.

JAMES DICKSON PHILLIPS, Circuit Judge:

The issue on these consolidated appeals is the constitutionality of a North Carolina statute providing that a single building that contains an adult bookstore, adult theater, adult mini-theater, massage parlor, or sexual device wares cannot contain a second such "adult establishment." 1 Two federal

^{1.} N.C.Gen.Stat. § 14-202.10. Definitions.—As used in this Article:

^{(1) &}quot;Adult bookstore" means a bookstore having as a preponderance of its publica-

Cite as 612 F.2d 821 (1979)

district courts determined, in separate suits brought by the proprietors of affected establishments, that the statute abridged freedoms of speech and press protected by the First and Fourteenth Amendments, the requirement of equal protection imposed by the Fourteenth Amendment, the due process proscription against vagueness, and the right of privacy guaranteed by the Constitution. On the defendant's appeals, consolidated in this court, we conclude that the Supreme Court decision in Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) essentially controls decision here and requires reversal. We do so, and sustain the statute over free speech and press, equal protection, vagueness and privacy objections.

The statute under attack prohibits the location of any one "adult establishment" in the same "building, premises, structure, or other facility" occupied by another adult establishment or sexual device vendor. N.C.Gen.Stat. § 14-202.11. "Adult establishment" is defined to include adult bookstores, adult motion picture theaters, and adult mini-theaters, having a "preponderance" of wares "distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas," and also to include massage businesses. *Id.*

tions, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an adult bookstore, adult motion picture theater, adult mini motion picture theater, or a massage business as defined in this section.

(3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or cháracterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(4) "Adult mini motion picture theater" means an enclosed building with a capacity for less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors. (7) "Sexually oriented devices" means without limitation any artificial or simulated specified anatomical area or other device or paraphernalia that is designed in whole or part for specified sexual activities.

- . (8) "Specified anatomical areas" means:
- a. Less than completely and opaquely covered:
- (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
- b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.
- (9) "Specified sexual activities" means:
- a. Human genitals in a state of sexual stimulation or arousal;
- b. Acts of human masturbation, sexual intercourse or sodomy; or
- c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts.

§ 14-202.11. Restrictions as to adult establishments.—No building, premises, structure or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment.

• § 14-202.12. Violations; penalties.—Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three hundred dollars (\$300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars (\$500.00), or both, in the discretion of the court.

§ 14-202.10. "Specified sexual activities" and "specified anatomical areas" are defined as sexually explicit or erotic things. Id. Violations are made misdemeanors, punishable by fines up to \$500 and imprisonment up to six months. Id. § 14-202.12.

Civil actions challenging the statute in the Eastern and Western Districts of North Carolina requested injunctive and declaratory relief. The proprietor-plaintiffs alleged, and the district courts below found, that the statute limited plaintiffs' ability to choose the types of material to be sold or exhibited in their stores; that in order to avoid prosecution, the plaintiffs who sold both books and films emphasizing sexual matters were obliged to acquire a prepon--derance of non-sexually-oriented books in order to continue the exhibition of sexuallyoriented films; and that all of them abandoned the sale of sexual devices in order to comply with the statute. The plaintiffs alleged that these changes increased the cost of doing business though none went so far as to contend that they had been forced close their establishments or that their demise was imminent as a result of their compliance with the statute.

On the basis of these findings, one district court held in consolidated actions, Hart Book Stores, Inc. v. Edmisten, 450 F.Supp. 904 (E.D.N.C.1978), that the North Carolina statute violates the First Amendment and the equal protection guarantee of the Fourteenth Amendment, in that it allows, without sufficient justification, a "significant intrusion" into businesses dealing in materials protected by the First Amendment. Id. at 906. The court further concluded that Young v. American Mini-Theaters, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) did not apply because the North Carolina statute, unlike the ordinance upheld in Mini-Theatres, was not a true zoning law. 450 F.Supp. at 906-07.

In U. T. Inc. v. Edmisten, Nos. 77-365 and 77-366 (W.D.N.C. July 24, 1978), the other district court also found that the statute contravened freedom of speech and

equal protection. Additionally, the latter court held the statute unconstitutionally vague and in violation of the right of privacy. Id., slip op. at 4-5. Finally, that court also concluded that Mini-Theatres did not control the case before it and was not inconsistent with its ruling. Id. at 6.

I

Unlike the district courts, we consider that the Supreme Court decision in Mini-Theatres, upholding a Detroit ordinance that prohibited locating "adult" establishments within one thousand feet of each other, essentially controls decision here. Since much of our analysis parallels and draws from the Mini-Theatres analysis, it seems appropriate at the outset to summarize the salient factual aspects of that case, comparing them with comparable aspects of the instant cases, and then to summarize what appear to us the critical features of that decision.

The Detroit ordinance prohibited "more than two [regulated] uses within one thousand feet of each other," id. at 54 n.6, 96 S.Ct. at 2444 n.6, and defined regulated uses as adult bookstores, adult motion picture theaters, adult mini motion picture theaters, cabarets with nude or partially-nude entertainment, and also dance halls, bars, pool halls, public lodging facilities, secondhand stores, pawnshops, and shoeshine parlors, id. at 52 n.3, 96 S.Ct. 2440. The ordinance defined adult bookstores, adult theaters, and adult mini-theaters as those "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas," id. at 53-54 n.5, 96 S.Ct. at 2444 n.5, and defined those sexually-explicit activities or areas in terms virtually identical to the North Carolina statute, id. at 53 n.4, 96 S.Ct. 2440.

In addition to their similar terms and definitions, both the Detroit and North Carolina laws essentially regulate in similar fashion the place and manner of "adult establishment" operations. The fundamental effect sought by both is geographic dispersal of these operations, in an obvious attempt to reduce adverse external effects perceived to result from a concentration of "adult" activities. They differ only in the methods chosen to force dispersal: Detroit permits adult bookstores, theaters, and mini-theaters to operate only if they are at least 1,000 feet from any other adult establishments and other regulated uses, while North Carolina permits such adult bookstores, theaters, and mini-theaters to operate only if they are in a different building and on different premises from any one such adult establishment and other regulated uses (i. e., massage parlors or sexual device vendors).

Two other differences must be noted. The Detroit ordinance was an amendment to an existing "Anti-Skid Row Ordinance," adding adult establishments to a group of previously regulated uses. The Detroit ordinance did not affect existing establishments but only the location of new ones, while the North Carolina statute affects existing as well as future adult establishments, but allowed a six month grace period between the statute's passage and its effective date. While we do not consider these critically distinguishing, they deserve and are given specific attention in subsequent discussion.

The majority opinion in Mini-Theatres rejected arguments that the Detroit ordinance violated the First Amendment . through prior restraint or vagueness, 427

2. [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same.

U.S. at 58-63, 96 S.Ct. 2440, and then in a four-member plurality opinion, with the concurrence of a fifth justice in the result, rejected arguments that the law violated the First Amendment or equal protection as a classification on the basis of content and a disparate treatment of the resulting classes, id. at 63-73, 96 S.Ct. 2440 (plurality opinion of Stevens, J.); id. at 75-76, 96 S.Ct. 2440 (Powell, J., concurring). The plurality opinion was apparently premised on the four Justices' finding of a "lesser" First Amendment protection for erotic material, which permits reasonable regulation of such material in furtherance of a legitimate government interest.2 Justice Powell did not reach this issue in his concurring opinion, but indicated that he was not inclined to agree with the plurality's approach,3 while the four dissenting justices emphatically rejected any notion of a diminished First Amendment protection for erotic materials. Id. at 96, 96 S.Ct. 2440.

While simply as a matter of stare decisis we consider the holding in Mini-Theatres dispositive of the central issues in these appeals whether the rationale be that of the plurality or of Justice Powell concurring, we prefer to rest our holding on the reasoning employed by Justice Powell. With him, we think that regardless of the level of First Amendment protection to which sexually-explicit publications and films (erotic materials) are entitled, a sufficient justification for any incidental burden produced by the location regulation involved here is provided by an important and substantial state interest under the test in United

But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

427 U.S. at 70, 96 S.Ct. at 2452.

3. "I do not think we need reach, nor am I inclined to agree with, the holding in Part III (and supporting discussion) that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." Id. at 73 n.1, 96 S.Ct. 2440.

States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). That test sustains a regulation primarily of conduct or noncommunicative aspects of protected materials that imposes an incidental burden on expression "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377, 88 S.Ct. at 1679. In Mini-Theatres Justice Powell found that (1) regulation of the location of adult establishments, as of any other businesses, was within the police power, 427 U.S. at 75, 80, 96 S.Ct. 2440; (2) such regulation furthered important and substantial state interests in preventing neighborhood deterioration and crime, id. at 80, 96 S.Ct. 2440; (3) these interests were directed at secondary effects of concentrated adult establishments and not at suppression of speech, id. at 74-75, 96 S.Ct. 2440; and (4) the incidental burden, if any, was no greater than essential because the ordinance was directed only at adult establishments and not at other bookstores and theaters lacking those secondary effects, id. at 82, 96 S.Ct. 2440.

We believe that the North Carolina statute also satisfies the O'Brien test. We will first examine the effect of the statute on First Amendment-protected expression, and then consider that effect in light of the other elements of the O'Brien test. In Part III we consider whether the statute impermissibly classifies expression according to its content and treats the resulting classes unequally, in violation of equal protection. The contention that the statute is unconstitutionally vague is discussed in Part IV; and in Part V we consider the claim that it violates the right to privacy.

4. See Dover News, Inc. v. City of Dover, 381 A.2d 152, 755-56 (N.H.1977) (prohibiting offenH

[1] We find the North Carolina statute to be merely a regulation of the place and manner of expression, without proscription of that expression, of the type not forbidden by the First Amendment. See California v. LaRue, 409 U.S. 109, 117 n.4, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); Cox v. New Hampshire, 312 U.S. 569, 576, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). The essential regulation is of location. The statute prohibits dissemination of sexually-explicit materials in places where a building or premises is occupied by more than one adult bookstore, adult theater, adult mini-theater, massage parlor, or sexual device vendor. This essentially exhausts the force of the regulation. Dissemination of the affected materials in . the myriad of other available locations is not restricted. As both the plurality and concurring opinions in Mini-Theatres agreed in considering the analogous ordinance before that Court: ". . . what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited," id. 427 U.S. at 71, 96 S.Ct. at 2453 (plurality opinion), because the "ordinance is addressed only to the places at which this type of expression may be presented," id. at 78-79, 96 S.Ct. at 2456 . (Powell, J., concurring). Accord, Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1158 (1978) (en banc). If it can be thought that there is any further aspect of the regulation, it relates simply to the manner in which the materials may be disseminated. The North Carolina statute, like the Detroit ordinance, is aimed at prohibiting a "supermarket" marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Comparable regulation of specific techniques and methods of commerce in erotic materials has not been thought violative of First Amendment values.4

sive storefront displays); Borrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D.Ky.1978)

So long as protected materials continue to be fully available and public access to them is not substantially impaired, place and manner regulations of this type do not offend the First Amendment. 427 U.S. at 76-78, 96 S.Ct. 2440. (Powell, J., concurring). The North Carolina statute, like the ordinance in Mini-Theatres, does not limit the total number of adult establishments or restrict them to any one area; nor does it ban any type of sexually-explicit material. While one district court below found that "a reduction of availability may well occur." U. T. Inc. v. Edmisten, Nos. 77-365 and 77-366, slip op. at 3, (W.D.N.C. July 24, 1978) (emphasis added), that court did not find a great probability of such reduction, and the other actually speculated that the statute "logically leads to a proliferation of adult-oriented businesses as existing establishments open branch stores to comply," Hart Book Stores v. Edmisten, 450 F.Supp. 904, 907 (E.D.N.C.1978). In fact, it is too early to be certain of the long-range effect of the law on availability of these materials to the public. On the record before us, it can only be noted that thus far the adult establishments involved have all apparently opted for compliance rather than closing, so that overall availability of the materials would seem little affected.

The Detroit ordinance upheld in Mini-Theatres actually imposed a greater restraint in many respects than does the North Carolina statute: Detroit forced dispersal by a 1,000 foot distance rather than simply to adjacent buildings or neighboring premises. Further, it excluded adult establishments from any area already occupied by any two hotels, motels, bars, cabarets, dance halls, pawnshops, poolhalls, or shoeshine parlors, while North Carolina does not. Finally, the Mini-Theatres defined adult bookstores and theaters as those with a "substantial or significant portion" of their materials featuring sexual explicitness, while the North Carolina statute restricts its definition to bookstores and theaters with a "preponderance" of sexually explicit materials. Compare Young v. American Mini-Theatres, Inc., 427 U.S. at 52 n.3, 53-54 n.5, 96 S.Ct. 2440 with note 1 supra.5

Both district courts thought it of critical significance that the statute imposed a significant economic burden on the sale or exhibition of erotic materials. See U. T. Inc. v. Edmisten, slip op. at 2; Hart Book Store, Inc. v. Edmisten, 450 F.Supp. at 906. While it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, we simply do not find those exceeded by the relocation burden involved here. Zoning and other regulations for the public welfare frequently are an economic detriment to affected businesses; the fact that these carry materials protected by the First Amendment does not exempt them from the consequences of an otherwise valid regulation. Again we find Mini-Theatres dispositive:

The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they

(same). Cf. Developments in the Law—Zoning, 91 Harv.L.Rev. 1427, 1562-63 & n.81 (1978) (hours and design regulation of adult establishments would not violate First Amendment).

will be a substantial deterrence to protected First Amendment speech. It does not limit the total number of adult theaters which may operate in the City, or significantly inhibit viewers from gaining access to the films."); see Borrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D.Ky.1978); Note, Using Constitutional Zoning to Neutralize Adult Entertainment—Detroit to New York, 5 Fordham Urban L.J. 455, 473–74 (1977) (New York regulation "does not restrict or prohibit the content availability of adult entertainment").

S. In addition to Mini-Theatres, other cases have held that analogous regulations do not substantially restrict access to sexually-explicit materials or the availability of such wares. Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1157 (1978) (en banc) ("[T]here is no evidence that the effect of this ordinance

are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage.

The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression.

427 U.S. at 78, 96 S.Ct. at 2456 (Powell, J., concurring).

Because we conclude that the challenged statute is directed primarily at the noncommunicative aspects of protected expression, with only an incidental effect on expression itself, further analysis under the test in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) is appropriate. The first question is whether the regulation lies generally within the constitutional powers of the state. On this there can be no doubt that this statute, like the regulation in Mini-Theatres, is "certainly within the concept of the public welfare that defines the limits of-the police power."

- 6. See also Borrago v. City of Louisville, 456 F.Supp. 30, 31 (W.D.Ky.1978) (\$250 annual license fee and expensive requirement of door attendant to exclude minors); Airport Book Store, Inc. v. Jackson, 242 Ga. 214, 248 S.E.2d 623, 625, 629 (1978) (\$500 licensing investigation fee and employment disqualification for convicted felons); Northend Cinema, Inc. v. City of Seattle, 90 W. sh.2d 709, 585 P.2d 1153, 1160 (1978) (en banc) (location restriction similar to Mini-Theatres) (the "objection, that simply having to move to another location or show a different type of film is substantial economic harm, is unsupported").
- 7. We reach the same conclusion, via the same analysis, whether the statute is challenged as a prior restraint, a subsequent restraint, or as an unconstitutional condition, see U. T. Inc. v. Edmisten, slip op. at 4.
- 8. Appellees contend, and both district courts below found, that the challenged statute is not a zoning law, U. T. Inc. v. Edmisten, slip op. at 3; Hart Book Stores, Inc. v. Edmisten, 450 F.Supp. at 906-07. While we do not consider this point crucial to our analysis, we would note that many zoning enactments prohibit the mingling of particular uses in a single building just as the North Carolina statute bars the combination of adult uses in a single building.

427 U.S. at 75, 96 S.Ct. at 2454 (Powell, J., concurring). Whether or not the statute is a true zoning law,⁸ it is a legitimate exercise of the police power, under which the state may limit the use of private property for the public welfare. Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

The next question is whether the regulation furthers an important or substantial interest. We conclude that it does. North Carolina certainly has a substantial interest . in maintaining a stable, healthful environment in its cities. The legislature could reasonably have determined that the development of the "total, under one roof" approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood. While there is no formal legislative history of the law, the record does show that the sponsor of the legislation was concerned to bring these secondary effects to the legislature's attention.9 A legislative determination

The Supreme Court sustained under the zoning power an ordinance prohibiting the residential use of a single dwelling by unrelated individuals in Village of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), and upheld a regulation proscribing the combined use of a single commercial building for sexually-explicit entertainment and liquor serving in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972). Many laws prohibit the combination of a residential use and a commercial use of a dwelling; see, e. g., Jamison v. Kyles, 271 N.C. 722, 157 S.E.2d 550 (1967); City of Florence v. Turbeville, 239 S.C. 126, 121 S.E.2d 437 (1961).

Of course it is irrelevant that the challenged exercise of the police power is by a state rather than a municipality, even if it be thought important to qualify the state statute as a "zoning" law of the kind considered in Mini-Theatres. Both the general police power, and that aspect of it realized in "zoning" regulations, are reposed originally in the state. State v. Joyner, 286 N.C. 366, 369, 211 S.E.2d 320, 322 (1975); Allgood v. Town of Tarboro, 281 N.C. 430, 437, 189 S.E.2d 255, 260 (1972).

The sponsoring senator read to a legislative committee considering the bill a report from the Director of a County Health Department on that the dispersal of the marketing activities might ameliorate these secondary effects to some extent, thereby furthering the

state's interest, cannot be thought unreasonable. See Airport Book Store, Inc. v. Jackson, 242 Ga. 214, 248 S.E.2d 623, 628-29

(1978).10

Closely entwined is the next element of the O'Brien test: whether the state's interest is one unrelated to the suppression of free expression. One district court ruled that the statute failed this requirement of the O'Brien test. That court concluded that "the inescapable inference is that economic harm to plaintiffs' businesses was the primary legislative motive." 450 F.Supp. at 907. We believe that this conclusion misinterprets the O'Brien test. The relevant question under O'Brien is not whether the perceived "legislative motive" for legislation is unrelated to the suppression of free

the results of an inspection of several affected establishments in Wake County:

They visited five such establishments. At each they saw the usual array of pornographic publications. They found also cubicles or small booths where patrons enter, deposit a quarter and view assorted salacious films. Certain of the male customers masturbate under the resulting stimulation, ejaculating upon the floor and walls. The volume of semen was so considerable by mid-afternoon as to be trickling down the wall to the floor.

Each of the five places checked had such cubicles and film projecting equipment. These numbered from twelve to sixteen.

Though only male customers were seen on this occasion, females are also afforded similar attention. Dildos of every description were available for sale, for use on the premises or for removal therefrom.

Used condoms littered the floors. The use therefor can only be speculated upon.

When questioned about the mess, the operators generally observed that it didn't do much good to clean up; 'Twas soon all to do over again'

10. Other decisions have found similar location restrictions for adult establishments justified as zoning to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay. Nortown Theatre Inc. v. Gribbs, 373 F.Supp. 363, 369 (E.D.Mich.1974), rev'd sub nom. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), rev'd sub nom. Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (location for regulation necessary for preservation of neighborhoods"); Northend

expression, but whether an identifiable "governmental interest" is so unrelated. Indeed the O'Brien Court specifically disavowed any consideration of the legislative motive: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U.S. at 383, 88 S.Ct. at 1682. As the Court there observed, in conducting this inquiry, it is best to eschew altogether the "guesswork" of speculating about the motive of lawmakers, for the obvious reasons that many legislators may have different purposes in legislation than the few who are moved to com-ment on it. Id. at 384, 88 S.Ct. 1673.11 Courts must look in the final analysis to the legislation itself. On its face the challenged statute is a permissible regulation of

Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1156 (1978) (en banc) (sustaining lower court "finding that the location of adult theaters has a harmful effect on the area and contribute[s] to neighborhood blight"); see Young v. American Mini Theatres, Inc., 427 U.S. at 55, 96 S.Ct. 2440 (expert testimony that nearby concentration "encourages residents . . to move elsewhere); Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles 5 (City Plan Case No. 26475, City Council File No. 74-4521-S.3, 1977) (hereinafter cited as Effects of the Concentration of Adult Establishments) ("Businessmen, residents, etc. believe that the concentration of adult establishments has adverse effects on . . . the quality of life Among the adverse effects on the quality of life cited are increased crime; the effects on children; neighborhood appearance, litter and graffiti.").

11. Typical of the dead-end into which such judicial inquiries are likely to lead is the conflicting evidence about the personal motive of the House sponsor of this legislation. His own affidavit stated that he introduced this bill in hope that "the immoral atmosphere and unsanitary conditions described in the health inspector's letter would be less likely to occur." (App. 81). Two newspaper reporters who covered the bill's passage stated in affidavits that the legislator had told them he sponsored the bill because it would cut the profits of adult businesses and probably would drive them out of business. (Jt.App. 82, 84).

the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption.¹²

Finally we conclude under the O'Brien test that the incidental restriction on First Amendment interests is no greater than is essential to furtherance of the state's interest. The means chosen by North Carolina in its effort to eliminate the undesired secondary effects of adult establishments appears to be one of the least burdensome means the state could have chosen; indeed it may prove to be totally ineffectual, or as one district court actually predicted, "have a minimal effect on degenerate conduct." 450 F.Supp. at 907. The statute does not go as far in some respects as did the Detroit ordinance. It does not require dispersal of adult activities to a distance of 1,000 feet, but only to an adjacent building. Additionally, the statute is limited in its effect to adult bookstores and theaters, which are the only ones perceived to engender unhealthful conditions. Had the statute included all bookstores and theaters, or all commercial establishments, it might well have been far more restrictive than necessary. See 427 U.S. at 82, 96 S.Ct. 2440.

Plaintiffs charge that the statute is too burdensome because it does not exempt existing establishments as did the Mini-Theatres ordinance. It does, however, provide for a six month period before its effective date, 1977 N.C.Sess.Laws ch. 987, § 2. Under weil-established principles, this is a sufficient amortization period in view of the termination then of only some and not all erotic material sales in the building or premises. Many valid zoning laws apply immediately to existing uses, e. g., Village of Beile Terre v. Boraas, 415 U.S. 1, 94 S.Ct. 1536, 39 LEd.2d 797 (1974); Village of Euelid v. Ambier Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1925), and most take

12. We realize that the histories of this statute and of the Mini-Theacres ordinance differ in that the latter was an amendment to an ordinance that had applied the same restrictions to other regulated uses for ten years prior to the action of adult establishments to the list. 427 U.S. at 54, 96 S.Ct. 2440. We do not,

effect after an amortization period against existing establishments, e. g., State v. Joyner, 286 N.C. 366, 375, 211 S.E.2d 320, 325 (1975); see also Art Neon Co. v. City and County of Denver, 488 F.2d 118, 122 (10th Cir. 1973); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d at 1160 (sustaining three month amortization period for adult theater that permitted non-adult theater use thereafter); City of Los Angeles v. Gage, 127 Cal.App.2d 442, 461, 274 P.2d 34, 44-45 (1954) (sustaining termination of commercial use that permitted profitable residential use); Note, Using Constitutional Zoning to Neutralize Adult Entertainment-Detroit to New York, 5 Fordham Urb.L.J. 455, 472-74 (1977) (defending one year amortization period).

Though the particular method chosen by North Carolina may not prove to be effective in eliminating the undesirable spin-off conditions, we cannot say that legislative action is rendered irrational by its choice of a less efficacious and less powerful approach than the Constitution might permit.

III

[2] The district courts below both found that, in addition to the statute's impact on freedom of expression, it impermissibly discriminated between types of bookstores and theaters solely on the basis of the content of their wares. 450 F.Supp. at 904, 908; slip op. at 4. We reject these determinations and find no equal protection violation.

The unequal treatment of commercial establishments involved here is based most essentially on the different effects they are considered to have on their surroundings. See Young v. American Mini-Theatres, 427 U.S. 50, 32 n.6, 96 S.Ct. 2440, 49 L.Ed.2d 310. Moreover, we believe that a classification by content may be permissible in circumstances such as those involved here where the state has acted to protect other,

however, find this difference significant; the amendment itself was directed only at adult establishments and could have had the purpose of harming those establishments, but the Court found this not controlling. Id. at 80–81, 96 S.Ct. 2446 (Powell, J., concurring).

overriding interests. See, e. g., FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (plurality opinion) (upholding ban on nonobscene but "filthy" words on afternoon radio broadcast); Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding a prohibition on political, but not commercial, advertising on public transit vehicles); California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) (upholding proscription of nonobscene erotic dancing or movies in places where liquor was served).

Our conclusion that the statute does not violate equal protection is rested essentially on the same rationale as that which led us to conclude that no First Amendment violation is shown. Because the statute has only an incidental effect on protected expression, First Amendment interests are not directly threatened by the unequal treatment of adult and non-adult establishments, and consequently the classification may be justified if it is rationally related to an important state interest.13 We will not repeat our previous discussion of the merely incidental effect on expression and of the state's interest that is furthered by this regulation, but we do give additional consideration in this context to the challenged classification and to its rational relationship to the implicated state interest.

The North Carolina law regulates adult establishments differently from other bookstores and theaters because of the unique

13. While a classification and unequal regulation involving a suspect class or directly burdening fundamental rights such as fully-protected First Amendment interests can only be justified if it serves a compelling state interest by the least burdensome means, Dunn v. Blumstein, .405 U.S. 330, 337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), such a classification and regulation involving other classes of constitutional rights need only serve a legitimate state interest by rationally related means, City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); McDonald v. Board of Election Commissioners, 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). And a classification created by a zoning law is subject to this minimal scrutiny standard, Village of Belle external costs of adult enterprises. As Justice Powell wrote in Mini-Theatres, "the urban deterioration was threatened, not by the concentration of all movie theaters with other 'regulated uses,' but only by a concentration of those that elected to specialize in adult movies" and publications. 427 U.S. at 82, 96 S.Ct. at 2458. Such a classification and regulation of different classes on the basis of their different external costs or obtrusive characteristics has been upheld for other classifications touching on speech and press activities such as those involving picketing. See, e. g., Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (picketing or parading but not speech prohibited), DeGregory v. Giesing, 427 F.Supp. 910, 915 (D.Conn.1977) (3-judge court) (only labor picketing prohibited). Cf. Taylor v. City of Chesapeake, 312 F.Supp. 713 (E.D. Va.1970) • (live performances but not speeches and other expression prohibited). Special regulation of one commercial enterprise with particular externalities but not of other enterprises lacking those secondary effects has long been recognized not to violate equal protection, e. g., Hadacheck v. Sebastian, 239 U.S. 394, 412-14, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (brickmaking); Rosenthal v. People, 226 U.S. 260, 270-71, 33 S.Ct. 27, 57 L.Ed. 212 (1912) (junkyards), precisely because the enterprises are not similarly situated and the different treatment is warranted by the different secondary effects.

Terre v. Boraas, 416 U.S. 1, 8, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed.2d 303 (1926), as is a classification made by other police power regulation, McGowan v. Maryland, 366 U.S. 420, 425-27, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); see Lehman v. City of Shaker Heights, 418 U.S. 298, 304, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (plurality opinion). The Mini-Theatres plurality apparently considered that classification of sexually explicit materials would invoke only minimal scrutiny, 427 U.S. at 70-73, 96 S.Ct. 2440. Justice Powell in effect applied the same level of scrutiny in his analysis, but did so not because he considered that erotic materials deserved less protection, but because they were not actually suppressed by the zoning ordinance. Id. at 78-80, 96 S.Ct. 2440.

Plaintiffs rely upon Police Department of Chicago v. Mosely, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), in which the court invalidated on equal protection grounds an ordinance prohibiting all picketing near schools except labor dispute picketing, for their contention that classifications by content of speech are never permissible. Brief of Appellees at 26, 27. This broad principle, however, has been qualified many times; see, e. g., Greer v. Spock, 424 U.S. 828, 831, 838-39, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); Rowan v. United States Post Office Department, 397 U.S. 728, 735-38, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); Cox v. Louisiana, 379 U.S. 559, 563-64, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). Moreover, Mosely involved unequal treatment of speech occurring in a public forum, where speakers are necessarily similarly situated and no governmental interest justified the unequal treatment; it was based solely on the content of the speech.

The classification bears a rational relationship to the state interest earlier identified. One of the district courts did not agree on this critical point-because "[a]t best, the means chosen . . . would have a minimal effect on degenerate conduct" and at worst it would cause "a proliferation of adult-oriented businesses." Hart Book Stores, Inc. v. Edmisten, 450 F.Supp. at 907. But a legislative approach need simply be rationally related to the state objective when enacted, and need not have proved efficacious from the retrospective vantage point of a reviewing court. For example, in Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), a zoning limitation on multiple family habitation in a single dwelling that was not proved effective in relieving urban congestion and noise and advancing family values and clean air, was yet found rationally related to those state interests, id. at 8, 94 S.Ct. 1536.

In concluding that the rational relation between state interest and means of regulation required to support the classification was not present the district courts were also apparently greatly influenced by the dearth of hard evidence before the legislature that the interest was indeed threatened or that the means chosen to protect it would work. In this, we think they insisted on a showing that need not be made in order to uphold legislative efforts to deal with a problem within reach of the police power. In Mini-Theatres itself, the fact that the legislative body had before it the testimony of a single expert concerning the effect of adult businesses on neighborhoods, Nortown Theatre Inc. v. Gribbs, 373 F.Supp. at 365, was not thought to draw in question the rationality of the legislative decision to attempt regulation in the particular way chosen. As the Supreme Court pointed out in Paris Adult Theatre I v. Slayton, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637-2638, 37 L.Ed.2d 446 (1973): "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions," and "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." Furthermore, in judicial assessments of the rationality of legislative . means chosen to advance state interests. government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Mini-Theatres, 427 U.S. at 71, 96 S.Ct. at 2453. The very disparity of legislative approaches in various jurisdictions to regulating the kind of commercial enterprise involved here and the lack of a long record of regulatory efforts underscores the need for a chance for reasonable experimentation. See F. Strom, Zoning Control of Sex Businesses 53, 57, 62, 65, 71 (Boston: concentration of adult establishments; Chicago: dispersal; Dallas: dispersal; Oakland: dispersal; Indianapolis: special exception); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978) (Seattle: concentration).

Finding no violation of equal protection rights, we decline to invalidate North Carolina's effort to cope with a problem of commercial regulation under its police power simply because it treats those establishments that are perceived to have undesirable external effects differently from those that do not.

IV

[3] Next we consider appellee's contention that the statute is unconstitutionally vague. We reject this claim at the outset because it is apparent that under Young v. American Mini-Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, appellees lack standing to raise it. The statute's terms clearly apply to appellees, all of whom stock at least a preponderance of sexually-oriented materials in their establishments. The fact that they have had to change their · method of operation since the statute's effective date, see Brief of Appellees at 50, only confirms their understanding of the statute's effect and does not aid them in their vagueness claim.

In Mini-Theatres, a majority of the Supreme Court (Justice Powell joined in this portion of the opinion) held that, because the ordinance there clearly applied to them, the respondent adult theaters did not have standing to challenge the ordinance for vagueness. The majority agreed that the usual concerns that permit litigants who are not affected by vagueness in a law touching expression to raise the claim on behalf of others possibly affected are not present when sexually-explicit materials are at issue:

Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Id. 427 U.S. at 61, 96 S.Ct. at 2448. Accord, FCC v. Pacifica Foundation, 438 U.S. 726, 743, 98 S.Ct. 3026, 57 L.Ed.2d 1073

(1978). We find, on the record before us, that appellee adult establishments clearly come within the statutory terms and so lack standing to challenge them for vagueness.

[4] Furthermore, we believe that even were appellees granted standing to raise this issue, the statute would withstand a vagueness challenge. One district court below found vagueness in the North Carolina statute's reference to publications or films distinguished by their "emphasis" on sexual explicitness and to multiple adult establishments in a single "building, premises, structure or other facility." U. T. Inc. v. Edmisten, slip op. at 5. Plaintiffs also allege vagueness in the definition of "adult book-" stores," "adult . . . theaters," and "adult mini theaters"; the reference to a "preponderance" of the books or films in such establishments; the reference to material "depicting, describing or relating to" sexual explicitness; and the use of "distinguished or characterized by their em-Phasis" on erotic content. Brief of Appellees at 47, 49. We consider these statutory definitions reasonably specific and precise, bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary, Miller v. California, 413 U.S. 15, 27-28 n. 10, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Roth v. United States, 354 U.S. 476, 491-92, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The phrase "distinguished or characterized by an emphasis" on sexual explicitness, used in the Mini-Theatres ordinance, has been sustained in Nortown Theatre Inc. v. Gribbs, 373 F.Supp. 363, 367 (E.D.Mich. 1974), rev'd sub nom. American Mini-Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), rev'd sub nom. Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709. 585 P.2d 1153, 1157 (1978) (en banc). The terms "depicting, describing or relating to" specified sexual activities and areas, also used in the Mini-Theatres enactment, has been upheld over vagueness challenges in

For the same reasons, the Court declined to apply the First Amendment doctrine of overbreadth, id. at 59-60 & n. 17, 96 S.Ct. 2440.

Miller v. California, 413 U.S. at 24, 93 S.Ct. 2807; Nortown Theatre Inc. v. Gribbs, 373 F.Supp. at 367; Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d at 1157. The reference to the "predominant" character of publications or films has been sustained in Ward v. Illinois, 431 U.S. 767. 770-73; 97 S.Ct. 2085, 52 L.Ed.2d 738 (1977); is like the "dominant theme" test in Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); and is certainly less vague than the "substantial or significant portion" phrase, used in the Mini-Theatres ordinance, and upheld in Nortown Theatre Inc. v. Gribbs, 373 F.Supp. at 367; Airport Book Store, Inc. v. Jackson, 242 Ga. 214, 248 S.E.2d at 625 n. 1, 626 n. 3, 629. The definitions of "adult bookstores," "adult . . . theaters," and "adult . . . mini theaters" are not vague because their component elements are not. Finally, the meaning of building, premises, structure or other facility" is reasonably definite. Any ambiguity in the meanings of these terms as applied is, as the Supreme Court majority held in Mini-Theatres, " 'readily subject to a narrowing construction by the state courts." 427 U.S. at 61, 96 S.Ct. at 2448; see, e. g., Ward v. Illimois, 431 U.S. at 773-76, 97 S.Ct. 2085; Ginsberg v. New York, 390 U.S. 629, 643, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

Additionally, because this adult establishment law carries a criminal penalty, we are confident that the state courts will construe it to require scienter for its violation by adult establishment proprietors, in the sense of knowledge or reasonable awareness of the sexually-explicit content of a store's predominant wares and of the existence of other adult material or sexual device sales in the same building or premises. See Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); Grove Press, Inc. v. Flask, 326 F.Supp. 574, 578 (N.D.Ohio 1970), vacated on other grounds, 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973).

V

[5] Finally, we consider Appellees' contention that the North Carolina statute violates the constitutionally protected right of privacy.

The statute prohibits the sale of "sexually oriented devices" in the same building or premises as adult bookstores, theaters, minitheaters, or massage parlors. We assume for purposes of this discussion that the term "sexually oriented devices" would apply to contraceptives, although we recognize the possibility of a state court construction of the term to exclude contraceptive devices.

One district court below concluded that the North Carolina statute "violates the right of privacy since it seeks to ban the sale of prophylactic devices in places where primarily sexually oriented books are sold." citing Carey v. Population Services International, 43i U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); U. T. Inc. v. Edmisten, Nos. 77-365 and 77-366, slip op. at 5 (W.D. N.C. July 24, 1978). But Carey v. Population Services International involved a law placing a substantial burden on access to nonmedical contraceptives because it prohibited anyone except licensed pharmacists from selling them, 431 U.S. at 686, 689, 97 S.Ct. 2010. The statute challenged here, on the other hand, does not burden access to contraceptive devices, because it restricts their sale in only one place (i. e., buildings containing adult establishments) rather than prohibiting their sale in any place but one (i. e., licensed pharmacies) and this does not significantly restrict access to contraceptives in all the other places where they are more commonly sold. We see no reason why North Carolina cannot prohibit the sale of contraceptives along with other sexual devices in adult establishments, because the resulting restriction upon general access to them cannot sensibly be thought significant

VI

- In practical terms this statute may well be revealed as yet another essential failure in the ancient, essentially unequal struggle to contain various social side-effects of the commercial exploitation of human sexuality. An omniscience that could plumb the depths of the many strands of motivation behind this particular effort would undoubtedly reveal much of questionable social and philosophical insight as to both ends and means. Our concern is not, however, with questions of the practical ineptitude of legislation nor even with the possibility of its sheer silliness or asininity in a social or philosophical sense, see Griswold v. Connecticut, 381 U.S. 479, 527, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (dissenting opinion), but with whether it violates specific rights secured by the Constitution.

Finding no violation of the constitutional rights invoked here, we reverse the judgments of the district courts.

REVERSED.



UNITED STATES of America, Appellee,

Edgar C. McINTOSH, Jr., Appellant. No. 79-5036.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 4, 1979. Decided Dec. 18, 1979.

Defendant was convicted in the United States District Court for the Eastern District of Virginia, at Alexandria, J. Calvitt Clarke, Jr., J., of federal tax evasion and he appealed. The Court of Appeals, K. K. Hall, Circuit Judge, held that, in absence of federal prosecutors' authorizing or appearing to authorize state prosecutor to settle defendant's federal criminal liabilities, even if state prosecutor had represented to defendant, when he pleaded guilty to state gambling charges, that he would not be prosecuted by federal government on income tax charges, federal prosecutors would not be bound by such representation.

Affirmed.

James Dickson Phillips, Circuit Judge, a filed concurring opinion.

1. Contracts =1

Fairness of any voluntary agreement turns upon parties' expectations: first, that it will be honored by the other party and, second, that redress is available when necessary in the courts.

2. Criminal Law ⇔273.1(2)

Fundamental contract and agency principles must be applied to plea bargains as best means to fair enforcement of parties' agreed obligations.

3. Criminal Law = 273.1(2)

Where content of plea bargain and authority for its offer are at issue, traditional precepts of contract and agency should apply.

4. Criminal Law = 273.1(2)

In absence of federal prosecutors' authorizing or appearing to authorize state prosecutor to settle defendant's federal criminal liabilities, even if state prosecutor had represented to defendant, when he pleaded guilty to state gambling charges, that he would not be prosecuted by federal government on income tax charges, federal prosecutors would not be bound by the representation. 26 U.S.C.A. (I.R.C.1954) § 7201.

5. District and Prosecuting Attorneys ←8

Bare representation by unauthorized party cannot bind federal prosecutors to forego prosecution and source of such requisite authority is vested by Constitution in federal executive and none other.

Charles W. Schoeneman, Washington, D. C., for appellant.

Janet Hall, Asst. U. S. Atty. (William B. Cummings, U. S. Atty. and Stephen R. Barnett, Sp. Asst. U. S. Atty., Washington, D. C., on brief), for appellee.

Before HALL, PHILLIPS and MURNA-GHAN, Circuit Judges.

ploitation of human sexuality," the appeals court said. It have muster from prosecutions — withheld while the procession of human sexuality," the appeals court said. It have not concern, however, is not with questions of the said to the state of the state for the state for the state for the said inceptible of the said of the post of the said for the state for the state of the said of the law. No statistics are available on the statistics are available on the statistics are available on the said the appeals court said the law passed constitute. The said.

its valuable rights by their acquiescence, laches, or failure to act." 332 U.S. at p. 40, 67 S.Ct. at 1669. See also United States v. City and County of San Francisco, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940); Jake v. Elkins, supra; McGannon v. Straightledge, 32 Kan. 524, 4 P. 1042 (1884); Annot., 55 ALR 2d 554; 3 Am.Jur.2d, Adverse Possession, § 205.

[11] In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831) and Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912), the Supreme Court recognized that the United States Government, out of solicitude for the welfare of its Indian wards, undertook by Treaties, statutes and executive orders to establish legal relations to protect the Indian wards described as "a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith" which relationship "resembles that of a ward to his guardian." The trust obligations of that relationship were not abided by the United States when it approved the forged deeds of exchange in the cases of Begay and Mrs. Cecil Navajo. The forgeries rendered the deeds null and void. Without the consent of Begay and Mrs. Cecil Navajo to the conveyances, there was no termination of the trust relationship between the United States and these Indian wards. Furthermore, that relationship has never been abrogated by Congress. Nevertheless, appellant Albers contends that the district court imposed an unconstitutional burden of proof upon the defendants by applying the "presumption of title" inherent in 25 U.S.C. § 194, supra. Specifically, Albers contends that this presumption violates the concept of equal protection of the law "by arbitrarily favoring Indians over white persons." [Brief of Appellants, No. 83-1210, p. 35]. The Congress has plenary power over Indian lands and property in the exercise of its guardianship functions and this power has always been deemed a political power not subject to control by the judicial branch of government. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); Warren Trading Post Co. v. Arizona Tax

Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).

IV.

[12] Mrs. Cecil Nayajo cross-appeals from the district court's denial of her claim for damages pursuant to 25 U.S.C. § 179 which provides that every person who drives or otherwise conveys any livestock to range or feed on land belonging to any Indian, without consent of the tribe, is liable to a penalty of \$1 for each animal of such stock. The trial court denied this relief, finding that the predecessors of the defendants-appellants [Pruitts] were not implicated in the forgeries, that the plaintiffs had full use and benefit of the exchanged lands, and that there was no proof, with specificity, of damages allegedly suffered. We agree.

WE AFFIRM.



M.S. NEWS COMPANY a Kansas corporation, Plaintiff-Appellant,

٧.

Antonio CASADO, Mayor of the City of Wichita, Kansas; Robert C. Brown, Robert Knight, Gary Porter, and Connie Peters, members of the Board of Commissioners of the City of Wichita, Kansas, Richard LaMunyon, Chief of Police of the City of Wichita, Kansas, and John Dekker, City Attorney for the City of Wichita, Kansas, Defendants-Appellees.

-- No. 80-2093.

United States Court of Appeals, Tenth Circuit.

Nov. 16, 1983.

Rehearing and Rehearing En Banc Denied Dec. 23, 1983.

Distributor of periodicals and publications appealed from dismissal by the United States District Court for the District of Kansas, Wesley E. Brown, J., of its action for injunctive and declaratory relief against enforcement of portion of city ordinance prohibiting promotion of sexually oriented material to minors. The Court of Appeals, Holloway, Circuit Judge, held that: (1) city ordinance was not overbroad or vague; (2) classification in ordinance distinguishing between commercial enterprises and noncommercial enterprises was rationally related to legitimate state interest in stemming the tide of commercialized obscenity; and (3) ordinance did not create an impermissible prior restraint.

Affirmed.

1. Federal Civil Procedure \$\sim 2533\$

If district court considers matters outside pleadings, rule governing motion to dismiss requires court to treat motion to dismiss as one for summary judgment and to dispose of it as provided in summary judgment rule. Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

2. Federal Courts \$\sim 766

Since district court had before it matters outside pleadings, including two affidavits in support of request by distributor of publications, which was challenging city ordinance prohibiting the promotion of sexually oriented materials to minors, for a temporary restraining order and a preliminary injunction, dismissal would be reviewed as order granting summary judgment. Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

3. Obscenity ← 1. 1.4

To determine if material is obscene and therefore unprotected, trier of fact must inquire whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

4. Obscenity €=7

It was not inconsistent with decision holding that it was constitutional to proscribe sale of "girlie magazines" to minors, where magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults, to create an affirmative defense for displays that had a bona fide governmental, educational or scientific purpose.

5. Obscenity \$\sim 2.5

City ordinance prohibiting promotion of sexually oriented material to minors was not inconsistent with decision holding that it was constitutional to proscribe sale of "girlie magazines" to minors, where magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults, because it proscribed distribution and display of material that was not "suitable" for minors, in that ordinance approved in prior case and city's ordinance both used this term in the same context.

6. Obscenity 2.5

City ordinance prohibiting promotion of sexually oriented material to minors did not unconstitutionally expand definition of obscenity to include within its proscriptions definitions which were also incongruous with the patently offensive element of obscenity and which encompassed depictions of sexual conduct which were clearly legitimate and not hard-core, in that, although ordinances proscribed dissemination of some material protected as to adults, the proscription applied only to dissemination or display to juveniles, not adults.

7. Obscenity \$\sim 2.5

Use of the Miller obscenity test in city ordinance prohibiting promotion of sexually oriented material to minors did not render ordinance overbroad or vague.

8. Obscenity \$\infty 2.5

Ordinance prohibiting display of materials harmful to minors when minors as part of invited general public, would be exposed to view such material, which provided that such material was not displayed if it was

kept behind devices commonly known as blinder rags so that the lower two thirds of the material was not exposed to view, was not overbroad, in that, with respect to sale or distribution of materials harmful to minors, ordinance had a clear and acceptable standard that would permit sale or distribution to adults of such materials, portion of ordinance dealing with display of material was reasonably structured; restriction of viewing by adults of materials which were. as to adults, constitutionally protected was reasonable, and regulation based on content was justified by substantial governmental interest in protecting minors from exposure to harmful adult material.

9. Constitutional Law \$\infty 90(3)

Reasonable time, place and manner regulations of speech are permissible where regulations are necessary to further significant governmental interests, and are narrowly tailored to further the state's legitimate interest.

10. Constitutional Law ←82(4)

Invalidating legislation as overbroad on its face is manifestly strong medicine and is employed sparingly and only as last resort.

11. Constitutional Law ← 90(1)

Legislation should not be held facially overbroad unless it is not readily subject to a narrowing construction, and deterrent effect on speech is real and substantial.

12. Constitutional Law \$\infty 90.1(8)

Portion of city ordinance proscribing display of sexually oriented material to minors was conduct plus speech because it regulated manner in which material with a particular content could be disseminated; it did not regulate pure speech itself, and thus there would have to be substantial overbreadth for the ordinance to be held overbroad on its face.

13. Constitutional Law \$\sim 90.1(8)

Although minors are entitled to a significant measure of First Amendment protection, a narrowly drawn ordinance restricting that access to sexually oriented material does not abridge their First

Amendment rights. U.S.C.A. Const. Amend. 1.

14. Constitutional Law \$\sime 82(4)

In First Amendment area vague laws offend three important values, namely, they do not give individuals fair warning of what is prohibited, lack of precise standards permits arbitrary and discriminatory enforcement, and vague statutes encroach upon First Amendment freedoms by causing citizens to forsake activity protected by the First Amendment for fear it may be prohibited. U.S.C.A. Const.Amend. 1.

15. Obscenity ≈2.5

City ordinance prohibiting the display of sexually oriented material harmful to minors was not void for vagueness, in that ordinance provided fair warning of whatwas prohibited because it plainly prohibited display of material in manner so that minors would be exposed to it, common understanding and practices provided commercial establishments with sufficient notice of type of display ordinance was designed to prohibit, and whatever imprecision was present was mitigated by ordinance's scienter provision, there was no real danger of arbitrary enforcement, and ordinance would not lead citizens to forsake activity protected by the First Amendment. U.S.C.A. Const.Amend. 1.

16. Constitutional Law ←90.1(1)

Although it is not an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children, the Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. U.S.C.A. Const.Amend. 1.

17. Obscenity ←2.5

Definition of minors in city ordinance prohibiting promotion of sexually oriented material to minors to mean any unmarried person under age of 18 years was not unconstitutionally vague; moreover, ordinance made it a defense to prosecution if an

honest mistake was made to age of minor, which sufficiently protected commercial enterprises from whatever vagueness inhered in definition. U.S.C.A. Const.Amend. 1.

18. Constitutional Law ← 250.1(2)

Classification in city ordinance prohibiting promotion of sexually oriented material to minors that distinguished between commercial enterprises and noncommercial enterprises bore a rational relationship to legitimate state interest in stemming the tide of commercialized obscenity, and thus ordinance did not violate equal protection. U.S.C.A. Const.Amends. 5, 14.

Classifications that distinguish between commercial enterprises and noncommercial enterprises are upheld if they are rationally related to legitimate state interest. U.S. C.A. Const. Amends. 5, 14.

20. Constitutional Law \$\infty 90.1(8)

Neither threat of criminal prosecution, substantial penalties available to prosecutor, nor the allegedly almost indefinable standards contained in city ordinance prohibiting promotion of sexually oriented material to minors combined to create an unconstitutional prior restraint on right to distribute materials, in that ordinance does not require prior approval of authorities before any materials could be distributed or displayed and there was no prior administrative determination, nor any significant risk that one could be prosecuted for engaging in protected conduct.

21. Jury \$\infty 23(2)

City ordinance prohibiting promotion of sexually oriented material to minors was not unconstitutional on ground that it violated Sixth Amendment right to trial by jury because prosecutions under ordinance took place before municipal court for city, where trial was to the court, and the trial occurred without any determination on obscenity by jury, which was essential since

 At the time of the filing of this action before the district court, News was a wholesale distributor of various periodicals and publications in Wichita while a co-plaintiff, Town Crier of Wichita, Inc., was a retailer of such goods. contemporary community standards must be applied, where accused has right to appeal and then case would be tried de novo in district court where trial by jury could be requested. U.S.C.A. Const.Amend. 6.

22. Jury \$\infty 23(2)

Even assuming that jury system might be desirable method for judging obscenity by community standards, Kansas procedure whereby accused was first tried in municipal court, where case was tried to the court, was not unconstitutional in view of right it provided for de novo jury trial on appeal to the district court. U.S.C.A. Const.Amend.

Robert C. Brown of Smith, Shay, Farmer & Wetta, Wichita, Kan. (Jack Focht, Wichita, Kan., was also on brief), for plaintiff-appellant.

Stanley A. Issinghoff, Wichita, Kan. (Thomas R. Powell, Wichita, Kan., was also on brief), for defendants-appellees.

Robert T. Stephan, Atty. Gen. of Kan., and Thomas D. Haney, Deputy Atty. Gen. of Kan., Topeka, Kan., filed a brief for the State of Kan. as amicus curiae in support of defendants-appellees.

Before SETH, Chief Judge, and HOLLO-WAY and McWILLIAMS, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff M.S. News Company (News), is a wholesale and retail distributor of periodicals and publications in Wichita, Kansas. It appeals from dismissal of its action for injunctive and declaratory relief against enforcement of a portion of a Wichita ordinance. The ordinance, Number 36–172, amended sections 5.68.150 and 5.68.155 of the Code of the City of Wichita and created 5.68.156. This section prohibits the promotion of sexually oriented materials to minors. It is the sole portion of the ordinance

News has since acquired the assets of Town Crier of Wichita, Inc., and is a wholesale and retail distributor of periodicals and publications. Thus, News is the only plaintiff-appellant. See Brief of Appellant at 3-4.

at issue in this action, and it is reproduced as an appendix to this opinion.

The Wichita ordinance is designed to prevent minors from being exposed to sexually oriented materials that are harmful to them. The ordinance defines "harmful to minors" and makes it an offense to display such material to minors if, as a part of the invited general public, they will be exposed to it. It further proscribes, inter alia, selling, furnishing or presenting to minors any material or performance that is harmful to them.

The controlling facts are not in dispute. By early August 1979, plaintiff News became aware of the impending passage of the subject ordinance. On August 20, News brought this action against all members of the Board of Commissioners, the Chief of Police, and the City Attorney of Wichita. It sought a declaratory judgment that Section 5.68.156 "is unconstitutional on its face and as applied," and injunctive relief restraining the defendants from enforcing the section. The district judge promptly issued a temporary restraining order.

Defendants filed a motion to dismiss with a supporting brief claiming, inter alia, that the complaint failed to state a cause of action. News then filed a reply brief contesting the motion. The district court held a hearing to consider plaintiff's request for a permanent injunction and the defendants' motion to dismiss, heard argument, and took the matter under advisement. The judge shortly thereafter dissolved the temporary restraining order, denied the request for preliminary and permanent injunctive relief and granted defendant's motion to dismiss. Plaintiff appeals.

- 2. By dismissing plaintiff's action, the district court refused to enjoin enforcement of the newly enacted ordinance. The court held that on its face the ordinance was constitutional; the district court did not decide whether the ordinance is constitutional as applied. I R. 119. In such circumstances, we consider only whether the ordinance is constitutional on its face.
- If the district court considers matters outside the pleadings, Rule 12(b) requires the court "to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in

[1, 2] Plaintiff makes four main arguments on appeal, contending that the ordinance: (1) goes beyond the permissible scope of Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), and is overbroad and vague both on its face and as applied; ² (2) violates the Equal Protection Clause of the Fourteenth Amendment; (3) creates a prior restraint in violation of the First Amendment; and (4) deprives defendants of their Sixth Amendment right to a jury trial. We will consider each of these contentions in turn.³

· I

· FACIAL OVERBREADTH AND VAGUENESS

Plaintiff News challenges the ordinance for overbreadth and vagueness. It essentially says that the realistic effect of the ordinance will be to limit, by its overbroad application, the access of adults, and minors approaching adulthood, to constitutionally permissible material. News further argues that the ordinance is vague in that it neither affords fair warning to those within its reach, nor provides explicit standards for those who enforce it. Brief of Appellant at 17.

Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), rejected a vagueness challenge to a New York statute similar to the Wichita ordinance. The Supreme Court there held that it is constitutional to proscribe the sale of "girlie magazines" to minors, where the magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults. The Wichita ordinance at issue is almost identical to the

Rule 56 [Fed.R.Civ.P. 56]." Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972) (per curiam); see Owens v. Rush, 654 F.2d 1370, 1377 n. 9 (10th Cir.1981); 6 J. Moore & J. Wicker, Moore's Federal Practice (Part 2), ¶ 56.11[2] (1982). Here the district court had before it matters outside the pleadings, including two affidavits in support of News' request for a temporary restraining order and a preliminary injunction. See II R. 1-45. We therefore review the dismissal as an order granting summary judgment.

statute upheld in Ginsberg. Ginsberg, supra, 390 U.S. at 645-47, 88 S.Ct. at 1283-84. Plaintiff attempts to distinguish Ginsberg by pointing out differences between the two laws.

[3-6] There are two principal differences between the Wichita ordinance and the statute in *Ginsberg* that are relevant to the constitutionality of the Wichita ordinance on its face. First, the Wichita ordinance uses the *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), obscenity test,⁴ and second, it proscribes not just the dissemination of material harmful to minors, as *Ginsberg* did, but also the display of such material.⁵ We find no constitutional infirmity in the ordinance resulting from either of these changes, or in any of the prohibitions of display, sale or presentation of proscribed materials to minors.

A. Application of the Miller test

[7] We are unable to discern any substance to plaintiff's argument that replac-

4. The ordinance in Ginsberg used the test approved in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). Since then, in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) the Supreme Court has enunciated a somewhat different test. Under Miller, to determine if material is obscene and therefore unprotected, the trier of fact must inquire:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller, supra, 413 U.S. at 24, 93 S.Ct. at 2615 (citations omitted). The Wichita ordinance and the statute approved in Ginsberg both adapted the current obscenity test so it could be used to determine whether material is harmful to minors.

5. Plaintiff also argues that the ordinance "exceeds the rights conferred on the Government by Ginsberg v. New York." Brief of Appellant at 10. Plaintiff argues it is inconsistent with Ginsberg to create an affirmative defense for displays that have a bona fide governmental, educational or scientific purpose. We disagree and address the equal protection issues stemming from this later. See infra Part II.

ing the Memoirs test with the Miller test. creates either an overbreadth or vagueness problem. The ordinance in Ginsberg prohibited distribution to minors of material that was "harmful to minors." In defining "harmful to minors," the Memoirs obscenity: test was adapted so that material could not be distributed to minors if it: (1) appealed to the prurient interest of minors: (2) was patently offensive to what the adult community believed was suitable for minors; and (3) was utterly without social importance for minors. Ginsberg, supra, 390 U.S. at 646, 88 S.Ct. at 1284. The Wichita ordinance is virtually identical to that upheld in Ginsberg except that the Miller obscenity test is used rather than the Memoirs test; Although the ordinance alters the Miller test so that it can be used for determining what material is harmful to minors, this is precisely what the ordinance in Ginsberg did with the old Memoirs test. We reject the argument that the use of the Miller test

Plaintiff's contention that the ordinance is inconsistent with Ginsberg because it proscribes distribution and display of material that is not "suitable" for minors is without merit. The ordinance approved in Ginsberg and Wichita's ordinance both use this term in the same context.

We similarly reject plaintiffs' contention that the Wichita ordinance unconstitutionally expands the definition of obscenity to include "within its proscriptions ... definitions which are also incongruous with the 'patently offensive' element of Miller and which encompass depictions of sexual conduct which are clearly legitimate and not 'hard core.' " Brief of Appellant at 13. Although the ordinance does proscribe dissemination of some material protected as to adults, the proscription applies only to dissemination or display to juveniles, not adults. Plaintiff's argument implicitly rejects the rule from Ginsberg that it is constitutional to proscribe dissemination of generally protected materials to juveniles when such materials are harmful to them. Later cases recognize that the state has a legitimate interest in preventing juveniles from being exposed to sexually oriented materials even when they are not obscene as to adults. See, e.g., New York -, 102 S.Ct. 3348, v. Ferber, - U.S. -3354, 73 L.Ed.2d 1113 (1982); FCC v. Pacifica Foundation, 438 U.S. 726, 748-50, 98 S.Ct. 3026, 3039-41, 57 L.Ed.2d 1073 (1978) (plurality); Miller v. California, supra, 413 U.S. at 19, 93 S.Ct. at 2612.

rendered the ordinance overbroad or vague.

B. The prohibitions of the ordinance protecting minors

The Wichita ordinance prohibits (a) displaying material "harmful to minors," (b) selling, furnishing or presenting such material to minors; and (c) presenting to a minor any "performance" harmful to him. We feel that Ginsberg has already upheld all such prohibitions except that of display. We therefore focus on the overbreadth and vagueness challenges to the display prohibition.

The ordinance prohibits displaying materials harmful to minors when minors "as a part of the invited general public, will be exposed to view such material." The ordinance provides that such material is not displayed if it is "kept behind devices commonly known as 'blinder racks' so that the

6. We are not faced with an ordinance that is overbroad because it prohibits dissemination to minors of material that is not even obscene as to them. The Wichita ordinance is limited so that only material that is obscene as to minors may not be exposed to them. When courts have found similar legislation overbroad, generally the legislation has in some way sought to regulate material that is not obscene even as to minors. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (ordinance making it an offense for outdoor drive-in theatre to exhibit film containing any nudity); American Booksellers' Ass'n v. McAuliffe, 533 F.Supp. 50 (N.D.Ga.1981) (statute prohibiting display or sale to minors of material containing nude figures held overbroad because prohibition extends to material not obscene as to minors); Allied Artists Pictures Corp. v. Alford, 410 F.Supp. 1348 (W.D. Tenn.1976) (ordinance overbroad because it prohibited exposing juveniles to films containing language that was not obscene as to juveniles); American Booksellers Ass'n, Inc. v. Superior Court, 129 Cal.App.3d 197, 181 Cal.Rptr. 33 (2d Dist. 1982) (ordinance overbroad because it required sealing material containing any photo whose primary purpose is sexual arousal regardless of whether obscene as to minors); Calderon v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978) (ordinance overbroad because it prohibited sale and exhibition to juveniles of material that was not obscene as to juveniles); Oregon v. Frink, 60 Or.App. 209, 653 P.2d 553 (1982) (statute prohibiting dissemination of all nudity to minors overbroad belower two-thirds of the material is not exposed to view." We believe this provision is neither vague nor overbroad.

Although First Amendment challenges to legislation under the overbreadth and. vagueness doctrines are related,7 they are distinct. The vagueness doctrine is anchored in the Due Process Clauses of the Fifth and Fourteenth Amendments.8 and protects against legislation lacking sufficient clarity of purpose and precision in drafting. See Erznoznik v. City of Jacksonville, supra, 422 U.S. at 217-18, 95 S.Ct. at 2276-77; Grayned v. City of Rockford, 408 U.S. 104, 108-14 & n. 5, 92 S.Ct. 2294, 2298-302 & n. 5, 33 L.Ed.2d 222 (1972). Overbroad legislation need not be vague, indeed it may be too clear; its constitutional infirmity is that it sweeps protected activity within its proscription. See Erznoznik v. City of Jacksonville, supra, 422 U.S. at 212-13, 95 S.Ct. at 2274-75; Grayned v.

cause it does not limit prohibition to material that is obscene as to juveniles).

Nor are we faced with an ordinance whose standard for determining whether material is obscene either to minors or adults is vague. The Wichita Ordinance uses almost the identical language approved in Ginsberg with the exception of using the Miller test. When legislation designed to protect minors from sexually oriented matters has been found to be unconstitutionally vague, the standard for evaluating whether the material was obscene as to minors has generally been the source of the vagueness. See, e.g., Rabeck v. New York, 391 U.S. 462, 88 S.Ct. 1716, 20 L.Ed.2d 741 (1968) (per curiam); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968); American Booksellers Ass'n v. McAuliffe, 533 F.Supp. 50 (N.D.Ga.1981); Hillsboro News Co. v. City of Tampa, 451 F.Supp. 952 (M.D.Fla.1978); Calderon v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978). We are satisfied that the standard used in the Wichita ordinance is not · afflicted with such vagueness.

- 7. See e.g., Village of Hoffman Estates, Inc. v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 & n. 6, 102 S.Ct. 1186, 1191 & n. 6, 71 L.Ed.2d 362 (1982) (In determining whether there is substantial overbreadth the vagueness of the enactment should be analyzed).
- See, e.g., Parker v. Levy, 417 U.S. 733, 94
 S.Ct. 2547, 41 LEd.2d 439 (1974) (Fifth Amendment); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (Fourteenth Amendment).

City of Rockford, supra, 408 U.S. at 114, 92 S.Ct. at 2302. We consider the overbreadth and vagueness issues separately.

1. Overbreadth

As noted, plaintiff News argues that the Wichita ordinance is overbroad, restricting the access of adults and minors approaching adulthood to constitutionally permissible publications. Brief of Appellant at 17. News says that as commercial enterprises seek to avoid violating the ordinance, the natural tendency will be to limit materials available for view by anyone. *Id.* at 13.

- [8] We disagree. First, as noted, with respect to the sale or distribution of materials "harmful to minors," the ordinance has a clear and acceptable standard that will permit sale or distribution to adults of such materials. Second, the portion of the ordinance dealing with display of material "harmful to minors" is reasonably structured. It is true that compliance with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected. However, the restriction is reasonable and does not offend the First Amendment.
- [9] Reasonable time, place and manner regulations are permissible where the regulations are necessary to further significant governmental interests, Young v. American
- 9. In Village of Hoffman Estates, Inc. v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95, 102 S.Ct. 1186, 1191–92, 71 L.Ed.2d 362 (1982), the Court indicated that in considering a facial challenge to the constitutionality of a statute for overbreadth and vagueness, a court should first consider the overbreadth question and then the vagueness question.
- 10. One member of the plurality in Young v. American Mini Theatres, supra, would require that the regulation be no more intrusive than necessary to achieve the governmental purpose. Young, supra, 427 U.S. at 79-80, 96 S.Ct. at 2456-57 (Powell, J., concurring). The other four members of the plurality implied that the zoning ordinances might not be upheld but for the district court's finding that there were myriad locations where such theatres could be opened. Young, supra, 427 U.S. at 71-72 n. 35, 96 S.Ct. at 2452-53 n. 35 ("The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech.").

Mini Theatres, 427 U.S. 50, 63 & n. 18, 96 S.Ct. 2440, 2448 & n. 18, 49 L.Ed.2d 3104 (1976) (plurality), and are narrowly tailored to further the State's legitimate interest-Grayned v. City of Rockford, supra, 408. U.S. at 116-17, 92 S.Ct. at 2303-04.10 We. find Young, supra, instructive. In Young, the plurality held that Detroit zoning ordist nances providing that an adult theatre may not be located within 1000 feet of any two other adult theatres (or other "regulated uses") or within 500 feet of a residential area, was consistent with the First and Fourteenth Amendments. The plurality. recognized that this was content-based regulation but upheld it because the city had a sufficient interest in preserving the quality of urban life and the ordinance did not' suppress or greatly restrict access to lawful speech. Young, supra, 427 U.S. at 63-72 & n. 35, 96 S.Ct. at 2448-53 & n. 35 (plurality). Similarly the display provision of the Wichita ordinance is a regulation based on content. We believe that it is likewise justified by the substantial governmental interest in protecting minors from exposure to harmful adult material. 11 See supra note 5.

Moreover, the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them.¹² The

- 11. Other courts have similarly viewed restrictions on displaying sexually oriented materials to minors as time, place or manner regulations. See, e.g., American Booksellers Ass'n, Inc. v. Superior Court, 129 Cal.App.3d 197, 181 Cal. Rptr. 33 (1982) (ordinance requiring any material whose "primary purpose" was "sexual arousal" to be sealed was held overbroad because it restricted adults' access to materials they had right to obtain); Dover News, Inc. v. City of Dover, 117 N.H. 1066, 381 A.2d 752 (1977) (per curiam) (In dicta, court approves of a regulation requiring material harmful to minors to be displayed no lower than sixty inches).
- 12. Legislation whose purpose was to protect minors from exposure to sexually oriented materials has been stricken as overbroad when it unnecessarily restricted adults' access to the material. See, e.g., Butler v. Michigan, 352 U.S. 380, 381, 383, 77 S.Ct. 524, 524, 525, 1 L.Ed.2d 412 (1957) (statute proscribing sale of any book "manifestly tending to the corruption

ordinance permits the "display" of material harmful to minors if it is in blinder racks which conceal the lower two-thirds of the material. Thus, adults may still have some access to materials not obscene as to them, and they may purchase such material.

[10, 11] In considering News's claim of overbreadth,13 we must remember that invalidating legislation as overbroad on its face is "manifestly strong medicine" and is employed sparingly and "only as a last resort." New York v. Ferber, -- U.S. -, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). In Ferber, the court implied that when conduct plus speech is involved, the overbreadth "'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" New York v. Ferber, supra. — U.S. at · 102 S.Ct. at 3362 (quoting Broadrick v. Oklahoma, supra, 413 U.S. at 615, 93 S.Ct. at 2917). Moreover, legislation should not be held facially overbroad unless it is not readily subject to a narrowing construction, and the deterrent effect on speech is real and substantial. Young v. American Mini Theatres, supra, 427 U.S. at 60, 96 S.Ct. at 2447; Erznoznik v. City of Jacksonville, supra, 422 U.S. at 216, 95 S.Ct. at 2276.14

[12, 13] The portion of the Wichita ordinance proscribing display to minors is con-

of the morals of youth" "not reasonably restricted to evil with which it is said to deal" because it reduces adult population "to reading only what is fit for children."); Home Box Office, Inc. v. Wilkinson, 531 F.Supp. 987, 997 (D.Utah 1982) (despite asserted child protection justification, statute proscribing distribution of indecent material by wire or cable held overbroad because it proscribes distribution to homes having no children); see also Community Television of Utah, Inc. v. Roy City, 555 F.Supp. 1164, 1166 n. 8, 1172–73 (D.Utah 1982) (ordinance analogous to statute in Wilkinson, supra, held overbroad, following reasoning of Wilkinson).

13. It is not clear if plaintiff argues that the ordinance is overbroad merely because it regulates the distribution of materials that are constitutionally protected as to adults, or whether the display provision itself is overbroad. See

duct plus speech because it regulates the manner in which material with a particular content can be disseminated; it does not regulate pure speech itself. Thus, there must be substantial overbreadth for the ordinance to be held overbroad on its face. We find no such infirmity. As noted, the display portion of the ordinance does not restrict minors' access to materials which they have a constitutional right to obtain. See Ginsberg, supra, 390 U.S. at 634-43, 88 S.Ct. at 1277-82. The ordinance only prohibits displaying material "harmful to minors," and this term is defined to include only material that is obscene as to minors under the Miller test as adapted to evaluate whether material is harmful to minors. Although minors are entitled to a significant measure of First Amendment protection, Erznoznik v. City of Jacksonville, supra, 422 U.S. at 212-13, 95 S.Ct. at 2274-75; Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), a narrowly drawn ordinance restricting their access to sexually oriented material does not abridge their First Amendment rights. See Ginsberg, supra, 390 U.S. at 634-43, 88 S.Ct. at 1277-82.

We therefore hold that the display provision of the ordinance is not overbroad on its face.

Brief of Appellant at 17, 20. We have already rejected the former argument, and we address the latter because we believe plaintiff raises the argument at least implicitly.

14. The Supreme Court has said "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute ... covers a whole range of easily identifiable and constitutionally proscribable ... conduct ... " New York v. Ferber, supra, — U.S. at — n. 25, 102 S.Ct. at 3362 n. 25 (legislation prohibiting sale of pornography in which children are engaged in explicit sexual acts); Parker v. Levy, 417 U.S. 733, 760, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974) (military articles prohibiting, inter alia, disobeying a lawful command from a superior) (quoting CSC v. Letter Carriers, 413 U.S. 548, 580-81, 93 S.Ct. 2880, 2897-98, 37 L.Ed.2d 796 (1973)).

2. Vagueness

[14] If a law threatens to inhibit First Amendment freedoms a more stringent vagueness test is used. See Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra, 455 U.S. at 499, 102 S.Ct. at 1193; Hynes v. Mayor of Oradell, 425 U.S. 610. 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976). In the First Amendment area vague laws offend three important values. First, they do not give individuals fair warning of what is prohibited. Second. lack of precise standards permits arbitrary and discriminatory enforcement. Finally, vague statutes encroach upon First Amendment freedoms by causing citizens to forsake activity protected by the First Amendment for fear it may be prohibited.15 Grayned v. City of Rockford, supra, 408 U.S. at 108-09, 92 S.Ct. at 2298-99; see Hynes v. Mayor of Oradell, supra, 425 U.S. at 620-22, 96 S.Ct. at 1760-61; see also General Stores, Inc. v. Bingaman, 695 F.2d 502, 503 (10th Cir.1982). Hejira Corp. v. MacFarlane, 660 F.2d 1356, 1365 (10th Cir. 1981).

[15, 16] We find no vagueness defect in the Wichita ordinance. First, the ordinance provides fair warning of what is prohibited. It plainly prohibits displaying material harmful to minors in a manner so that minors will be exposed to it. Although it is not "an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children," Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689, 88 S.Ct. 1298, 1306, 20 L.Ed.2d 225 (1968),

- 15. As Grayned noted, this third value is related to the first two. Grayned, supra, 408 U.S. at 109, 92 S.Ct. at 2299. Concern for this third value is unique to laws which seek to regulate First Amendment rights. The first two values are offended by any vague law. See, e.g., United States v. Salazar, 720 F.2d 1482 (10th Cir. 1983) (considering the first two values from Grayned and holding that law prohibiting illegal possession of food stamps is not unconstitutionally vague).
- 16. To satisfy the scienter requirement, the prosecution must show that the defendant knew the contents of the material and its nature and character. E.g., Hamling v. United

"'... the Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices'" Roth v. United States, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957) (quoting United) States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-42, (1947)). We believe that the ordinance does this. The obscenity standard as to minors is clearly defined. Common understanding and practices provide commercial establishments with sufficient notice of the type of display the ordinance is designed to prohibit. See Broadrick v. Oklahoma, supra, 413 U.S. at 608, 93 S.Ct. at 2913; Miller, supra, 413 U.S. at 27, 93 S.Ct. at 2616.

[17] Furthermore, whatever imprecision is present is mitigated by the ordinance's scienter provision. See Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra, 455 U.S. at 499, 102 S.Ct. at 1193 ("[S]cienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.") (footnote omitted). The ordinance defines knowingly in terms almost identical to the definition approved in Ginsberg. See Ginsberg, supra, 390 U.S. at 646, 88 S.Ct. at 1284. In addition to the degree of scienter that the Constitution requires be shown to obtain a conviction for violating obscenity laws,16 the Wichita ordinance, as Ginsberg did, makes it an excuse from liability if one makes an honest mistake as to a minor's age.17

States, 418 U.S. 87, 123-24, 94 S.Ct. 2887, 2910-11, 41 L.Ed.2d 590 (1974); Hunt v. State of Oklahoma, 683 F.2d 1305, 1308 (10th Cir. 1982); United States v. Sherwin, 572 F.2d 196, 201-02 (9th Cir.1977), cert. denied, 437 U.S. 909, 98 S.Ct. 3101, 57 L.Ed.2d 1140 (1978).

17. Plaintiff also argues that the term minors is vague. We reject this contention. The Wichita ordinance defines minor to mean "any unmarried person under the age of eighteen (18) years." The Ginsberg Court upheld a statute defining minor to be "any person under the age of seventeen years." Ginsberg, supra, 390 U.S. at 645, 88 S.Ct. at 1283. We see no difference

Second, we do not perceive any real danger of arbitrary enforcement. To violate the ordinance, one must display material which, taken as a whole, must fail the Miller test as applied to minors. This sufficiently constrains the discretion of the authorities. The ordinance adopts the correct standard for evaluating whether material is harmful to minors and we will not assume that the authorities will act in bad faith.

Third, we are not persuaded that the ordinance will lead citizens to forsake activity protected by the First Amendment. The ordinance is narrowly drawn within the confines of the Miller and Ginsberg standards. It provides fair warning of what is prohibited, and sufficiently constrains the discretion of the authorities. In such circumstances we do not believe it chills the exercise of First Amendment rights.

In sum, we are not persuaded to hold the Wichita ordinance invalid for vagueness.

· II

EQUAL PROTECTION

The Wichita ordinance provides that it is an affirmative defense if the material or performance was "displayed, presented or disseminated to a minor at a recognized and established school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency and [if this was done] for a bona fide governmental, educational or scientific purpose." Plaintiff News argues that the ordinance is violative of the Equal Protection Clause of the Fourteenth Amendment because only commercial establishments are subject to its sanctions.

[18, 19] We disagree. The ordinance creates a classification that distinguishes between commercial enterprises and non-commercial enterprises. Such classifica-

of constitutional magnitude between these two definitions.

Moreover, the Wichita ordinance makes it a defense to a prosecution if an honest mistake was made as to the age of the minor. This sufficiently protects commercial enterprises from whatever vagueness inheres in the definition of minor.

tions are upheld if they are rationally related to a legitimate state interest. See New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976) (per curiam); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810–14, 96 S.Ct. 2488, 2498–500, 49 L.Ed.2d 220 (1976); Hart Book Stores, Inc. v. Edminsten, 612 F.2d 821, 831 (4th Cir.1979), cert. denied, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980). See also Schilb v. Kuebel, 404 U.S. 357, 364, 92 S.Ct. 479, 484, 30 L.Ed.2d 502 (1971) ("[C]lassifications will be set aside only if no grounds can be conceived to justify them").

We rejected a similar argument in Piepenburg v. Cutler, 649 F.2d 783 (10th Cir. 1981). In Piepenberg a state statute prohibited exhibiting pornographic films and created an affirmative defense if their distribution "was restricted to institutions or persons having scientific, educational, governmental, or other similar justification for possessing pornographic material." Id. at 785. We rejected the argument that this violated the Equal Protection Clause, reasoning that it was possible to conceive of justifications for the classification.

We likewise believe that the Wichita ordinance's classification must be upheld. Distinguishing between commercial and non-commercial institutions bears a rational relationship to a legitimate state interest. The Supreme Court has recognized that there are "legitimate state interests at stake in stemming the tide of commercialized obscenity...." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57, 93 S.Ct. 2628, 2635, 37 L.Ed.2d 446 (1973); see also Young v. American Mini Theatres, supra, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (upholding zoning ordinances applicable to adult theatres or similar establishments). Commer-

18. We note that in Ginsberg, supra, 390 U.S. at 641, 88 S.Ct. at 1281, the Court said that "[t]o sustain state power to exclude material defined as obscenity by § 484—h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." (emphasis added).

cial enterprises have the economic incentive to make sales and are therefore more likely to press the display and dissemination of material harmful to minors. Hence, making a distinction between commercial and non-commercial enterprises is sufficiently grounded in a legitimate state interest.

We conclude that the ordinance does not violate the Equal Protection Clause.

Ш

PRIOR RESTRAINT

Plaintiff argues that the ordinance creates an impermissible prior restraint. It contends that the threat of criminal prosecution, the substantial penalties available to a prosecutor, and the almost indefinable standards combine to create an unconstitutional prior restraint on the right to distribute their materials. Brief of Appellant at 34. We disagree.

[20] The ordinance creates a penalty for violating its terms. It does not require prior approval of the authorities before any material can be distributed or displayed. "[T]here is a world of difference between a government statement that one cannot speak at all and a statement that one can speak out at some risk of paying a specified cost." Hunter, Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton, 67 Cornell L.Rev. 283, 293 (1982).

The Supreme Court has expressed a preference for subsequent punishment over prior restraint. See, e.g., Southeastern Pro-

19. See, e.g., Bantam Books v. Sullivan, supra, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (State Commission notified book distributors that it has found publications objectionable and that it would recommend prosecution of distribution thereof because the Commission believed books were tending to the corruption of the youth); see also Entertainment Concepts, Inc., . III v. Maciejewski, 631 F.2d 497 (7th Cir.1980), cert. denied, 450 U.S. 919, 101 S.Ct. 1366, 67 LEd.2d 346 (1981) ("penalty of suspension or revocation [of theatre's license on finding it had shown obscene film) is unconstitutional prior restraint "because decision that movie is obscene is made and license is revoked before opportunity to have a court determine if movie is obscene); Penthouse Internat'I Ltd. v. McAu-

motions, Ltd. v. Conrad, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975); Carroll v. Princess Anne, 393 U.S. 175, 180-81, 89 S.Ct. 347, 351, 21 L.Ed.2d 325 (1968); see also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 589, 96 S.Ct. 2791, 2817, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring); New York Times Co. v. United States, 403 U.S. 713, 733-37, 91 S.Ct. 2140. 2151-53, 29 L.Ed.2d 822 (1971) (White, J., concurring). The Court has suggested that although the Government may not be ableto restrain an individual from expressing himself, it does not follow that he cannot be punished if he abuses his rights. Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. 558-59, 95 S.Ct. 1246.

We are mindful that the Supreme Court has held that a system of prior administrative notice of a determination of obscenity as to particular publications, with subsequent criminal prosecution for distribution possible, violated constitutional rights protected by the Fourteenth Amendment. See, e.g., Bantam Books, Inc. v. Sullivan. 372 U.S. 58, 70-71, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).19 Such a conclusion is not justified here, however, because there is no such prior administrative determination, nor any significant risk that one may be prosecuted for engaging in protected conduct. We cannot say that on its face the Wichita ordinance has the infirmities of a prior restraint. The standard by which materials are to be judged is neither overbroad nor vague and there have been no threats of bad faith enforcement.

liffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S.Ct. 3031, 65 L.Ed.2d 1131 (1980) (where authorities embarked on program of arresting everyone who distributed certain publications and made this action public, causing retailers in county to cease selling publications, the conduct amounted to an informal system of prior restraint); Drive In Theatres, Inc. v. Huskey, 435 F.2d 228 (4th Cir.1970) (County Sheriff announced he would prosecute anyone showing a movie rated "R" or "X" because he believed they were obscene); Bee See Books Inc. v. Leary, 291 F.Supp. 622 (S.D. N.Y.1968) (Stationing police officers in bookstores indicated to patrons that material sold was illegal and this constituted advance censorship).

We conclude that the ordinance imposes no unlawful prior restraint.

IV

TRIAL BY JURY

News also contends that the ordinance is unconstitutional because it violates the Sixth Amendment right to trial by jury. More specifically, it argues that prosecutions under the ordinance take place before the Municipal Court for the City of Wichita where trial is to the court, and the trial occurs without any determination on obscenity by a jury, which is essential since contemporary community standards must be applied.

Relying on Miller, supra, 413 U.S. at 26, 30, 33-34, 93 S.Ct. at 2616, 2618, 2619-20, News says "that the only manner in which the facts can be found so as to determine the prevailing standards in the adult community is through the decision of a jury." Brief of Appellant at 24. News reasons that the obscenity test "requires the participation of the community wherein the action is brought." Id. at 25, 93 S.Ct. at 2615. Likewise, News points to statements in Hamling v. United States, 418 U.S. 87, 105, 94 S.Ct. 2887, 2901, 41 L.Ed.2d 590 (1974), that a juror is permitted "to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination " News also relies on statements in Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), as support for its position that a jury trial is

20. Section 12-4502 provides:

Trial. All trials in municipal court shall be to the municipal judge or the municipal judge pro tem.

Kan.Stat.Ann. § 12-4502 (1982).

21. News cites the following statement in Ballew, supra, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234:

We do not rely on any First Amendment aspect of this case in holding the five-person jury unconstitutional. Nevertheless, the nature of the substance of the misdemeanor charges against petitioner supports the refusal to distinguish between felonies and misdemeanors. The application of the community's standards and common sense is impor-

constitutionally required in the first instance in obscenity cases.²¹

The defendants respond to the jury trial argument, inter alia, by pointing to the right to a jury trial de novo on appeal in such cases. Kansas, like numerous states, has a two-tier system for adjudicating specific cases. In Kansas, "[t]he municipal court of each city shall have jurisdiction to hear and determine cases involving violations of the ordinances of the city." Kan. Stat.Ann. § 12-4104 (1982). Some states provide a jury trial in each tier; others provide a jury only in the second tier but allow an accused to by-pass the first; and still others do not allow an accused to avoid a trial of some sort at the first tier before he obtains a trial by jury at the second. See Ludwig v. Massachusetts, 427 U.S. 618, 620, 96 S.Ct. 2781, 2783, 49 L.Ed.2d 732 (1976).

[21] Under the Kansas procedure, on a plea of no contest a finding of guilty may be adjudged. Kan.Stat.Ann. § 12-4406(b) (1982). If an accused pleads guilty, the municipal judge may hear evidence touching on the nature of the case, otherwise ascertain the facts, and then may refuse or accept the plea, assess punishment and enter the proper judgment. Kan.Stat.Ann. § 12-4407. All trials in the municipal court are to the municipal judge or the municipal judge pro tem. Kan.Stat.Ann. § 12-4502. However, the accused has the right to appeal and then the case is tried de novo in the district court where trial by jury may be requested.22

tant in obscenity trials where juries must define and apply local standards. See Miller v. California, 413 U.S. 15 [93 S.Ct. 2607, 37 L.Ed.2d 419] (1973). The opportunity for harassment and overreaching by an overzealous prosecutor or a biased judge is at least as significant in an obscenity trial as in one concerning an armed robbery. This fact does not change merely because the obscenity charge may be labeled a misdemeanor and the robbery a felony.

Id. at 241 n. 33, 98 S.Ct. at 1039 n. 33.

22. Three Kansas statutes delineate this procedure. Section 22–3610, Kan.Stat.Ann. (1981), provides:

The Supreme Court has said that such a procedure affords an accused "the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution." Ludwig v. Massachusetts, supra, 427 U.S. at 625, 96 S.Ct. at 2785. Moreover, it provides him a clean slate. Colten v. Kentucky, 407 U.S. 104, 112-19, 92 S.Ct. 1953, 1958-61, 32 L.Ed.2d 584 (1972).25 Hence we cannot agree that the decisions of the Supreme Court, considered together, call for a holding that this Kansas procedure for obscenity prosecutions is invalid. The Court's decisions in Ludwig and Colten have upheld the twotier systems and the earlier Callan decision

22-3610. Hearing on appeal. When a case is appealed to the district court, such court shall hear and determine the cause on the original complaint, unless the complaint shall be found defective, in which case the court may order a new complaint to be filed and the case shall proceed as if the original complaint had not been set aside. The case shall be tried de novo in the district court. (Emphasis added).

Section 12-4601, Kan.Stat.Ann. (1982), provides:

Appeal: stay of proceedings. An appeal may be taken to the district court in the county in which said municipal court is located:

(a) by the accused person in all cases; and

(b) By the city upon questions of law. The appeal shall stay all further proceedings upon the judgment appealed from.

(Emphasis added).

Section 22-3609(5), Kan. Stat. Ann. (1981), provides

that in such appeals from municipal courts, trial by jury may be requested. (Emphasis added).

23. Plaintiff News relies, inter alia, on Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888). In Ludwig, supra, 427 U.S. at 629–30, 96 S.Ct. at 2787–88, the Supreme Court pointed out that Callan recognized that the sources of the right to jury trial in the federal courts are several and include Art. III, § 2, cl. 3, of the Constitution which requires that "[t]he trial of all Crimes ... shall be by Jury." That language was said to be capable of being read as prohibiting, in the absence of a defendant's consent, a federal trial without a jury; and the court noted that the provision is not applicable to the States. 427 U.S. at 630, 96 S.Ct. at 2788. The right of trial by jury in state court as

is distinguishable, as we have explained. See note 23 supra.

We must now consider whether the reference to "the average person, applying contemporary community standards" in the First Amendment obscenity test, see Roth v. United States, 354 U.S. 476, 479, 77 S.Ct. 1304, 1305, 1 L.Ed.2d 1498 (1957), as well as the numerous references to the jury system which the Court has made while construing and defining this test, constitutionally mandate a jury trial in the first instance. News cites state court decisions holding that in obscenity cases an accused must have a jury trial at the first tier. See City of Kansas City v. Darby, 544 S.W.2d 529, 532 (Mo.

matter of federal constitutional law derives from the Sixth Amendment as applied to the States through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149–50, 88 S.Ct. 1444, 1447–48, 20 L.Ed.2d 491 (1968).

Furthermore, Ludwig also noted that to the extent that Callan may have rested on a determination that the right to a second tier jury trial was unduly burdened by a requirement that an accused be "fully tried" without a jury at the first tier, Callan was not controlling in a Massachusetts case like Ludwig because the defendant was able to circumvent trial in the Massachusetts first tier by "admitting to sufficient findings of fact." 427 U.S. at 630, 96 S.Ct. at 2788.

We believe that the instant Kansas case is distinguishable from Callan, as was the Massachusetts case in Ludwig. The Kansas two-tier system also permits a defendant to avoid being "fully tried" at the first tier. In a Kansas municipal court a defendant can plead guilty or no contest, Kan. Stat. Ann. § 12-4406 (1982), and sentence must be imposed without unreasonable delay. Id. § 12-4507. The defendant then can appeal to the district court where he "has an absolute right to a trial de novo ...," State v. Parker, 213 Kan. 229, 516 P.2d 153, 158 (1973), and the appeal stays "all further proceedings upon the judgment appealed from." Kan.Stat.Ann. § 22-3609(1) (1981); see also Id. § 12-4601 (1982). The defendant is entitled to "a trial de novo ... regardless of lack of error or the nature of his plea in the lower court." State v. Parker, supra, 516 P.2d at 157 (emphasis added). "The defendant's right to a new trial is unrestricted in that all he is required to do to obtain it is to appeal." Id., 516 P.2d at

We feel that both grounds used in *Ludwig* to distinguish *Callan* apply here and that the Kansas procedure is supported by *Ludwig*.

1976) appeal dismissed, 431 U.S. 935, 97 S.Ct. 2644, 53 L.Ed.2d 252 (1977); cf. City of Duluth v. Sarette, 283 N.W.2d 533, 537-38 (Minn.1979). The Darby case, which relied on the above-mentioned portions of Miller and Hamling, capsulizes plaintiff's point, stating that it held "in obscenity cases only, that a trial by jury is required in the first instance and that a trial by jury after appeal to circuit court 'does not satisfy the requirements of the Constitution.'" (Quoting Callan v. Wilson, 127 U.S. 540, 557, 8 S.Ct. 1301, 1307, 32 L.Ed. 223 (1888)). (Emphasis in original).

We are not persuaded to follow these decisions. The Supreme Court has not held that the trier of fact in cases applying the obscenity test must, ipso facto, be a jury. The Court has recognized that there is no constitutional right to a trial by jury in state civil proceedings to determine what is obscene material. Alexander v. Virginia, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973). Indeed it has been held by some courts that criminal prosecutions for obscenity need not be by jury trials. See Coble v. City of Birmingham, 389 So.2d 527. 533 (Ala.Cr.App.1980); Holderfield v. City of Birmingham, 380 So.2d 990, 991-93 (Ala. Cr.App.1979), cert. denied, 449 U.S. 888, 101 S.Ct. 245, 66 L.Ed.2d 114.

[22] And even assuming that the jury system may be the desirable method for judging obscenity by community standards, the Kansas procedure is not unconstitutional in view of the right it provides for a de

24. As amicus curiae, the State of Kansas argues that there can be no violation of the Sixth Amendment right to a jury trial because a violation of the ordinance is a petty offense. The amicus points out that the maximum penalty under the ordinance is a fine of not more than five hundred dollars and a jail term not to exceed one month. Although we recognize that a petty offense is "usually defined by reference to the maximum punishment that might be imposed ...," Ludwig v. Massachusetts, 427 U.S. 618, 624-25, 96 S.Ct. 2781, 2785, 49 LEd.2d 732 (1976), and that a maximum one month sentence and five hundred dollar fine might be light enough to be a petty offense, see Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) (plurality); Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20

novo jury trial on appeal. Commonwealth v. Rich, 63 Pa.Commw. 30, 437 A.2d 516, 520–21 (1981); Manns v. Commonwealth, 213 Va. 322, 191 S.E.2d 810, (1972); Walker v. Dillard, 363 F.Supp. 921 (W.D.Va.1973), rev'd on other grounds, 523 F.2d 3 (4th Cir.), cert. denied, 423 U.S. 906, 96 S.Ct. 208, 46 L.Ed.2d 136 (1975). In the de novo jury trial the accused has a clean slate. Colten v. Kentucky, supra, 407 U.S. at 119, 92 S.Ct. at 1961. Moreover the appeal stays "all further proceedings upon the judgment appealed from," Kan.Stat.Ann. § 12–4601 (1982).24

We find no violation of plaintiff News's constitutional rights under the First or Sixth Amendments in the procedure laid out for prosecution of violations of the ordinance.

V

In sum, we are not convinced that there is any substantive or procedural infirmity demonstrated in the Wichita ordinance. Accordingly the judgment is

AFFIRMED.

APPENDIX

Section 5.68.156 to ordinance number 36-172 of the Code of the City of Wichita, Kansas, provides as follows:

Displaying material harmful to minors.

(1) Definitions. Minor means any unmarried person under the age of eighteen (18) years.

LEd.2d 491 (1968), we do not rest our decision on this ground.

The ordinance is uniquely subject to repetitive violation, creating the threat of substantial penalties. Under the ordinance, "[e]ach day that any violation of [the ordinance] occurs or continues shall constitute a separate offense [, and] [e]very act, thing, or transaction prohibited by [the ordinance] shall constitute a separate offense as to each item, issue or title involved...." In such circumstances, we are not inclined to rely on the "ill-defined, if not ambulatory" boundaries of the petty offense category. Duncan v. Louisiana, supra, 391 U.S. at 160, 88 S.Ct. at 1453. It is on the other grounds discussed that we uphold the ordinance.

APPENDIX-Continued

'Harmful to Minors' means that quality of any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse when the material or performance, taken as a whole, has the following characteristics:

- (a) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; and
- (b) The average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sado-masochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and
- (c) The material or performance lacks serious literary, scientific, educational, artistic, or political value for minors.

'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering; the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, record, or recording tape, video tape.

'Performance' means any motion picture, film, video tape, played record, phonograph or tape, preview, trailer, play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration.

'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- (a) The character and content of any material or performance which is reasonably susceptible of examination by the defendant, and
- (b) The age of the minor; however, an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

'Person' means any individual, partnership, association, corporation, or other legal entity of any kind.

'A reasonable bona fide attempt' means an attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate or other governmental or educational identification card or paper and not relying solely on the oral allegations or apparent age of the minor.

- (2) Offenses. No person having custody, control or supervision of any commercial establishment shall knowingly:
 - (a) display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material provided, however, a person shall be deemed not to have "displayed" material harmful to minors if the material is kept behind devices commonly known as "blinder racks" so

APPENDIX-Continued

that the lower two-thirds of the material is not exposed to view.

- (b) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors; or
- (c) Present to a minor or participate in presenting to a minor, with or without consideration, any performance which is harmful to a minor.
- (3) Defenses. It shall be an affirmative defense to any prosecution under this ordinance that:

The material or performance involved was displayed, presented or disseminated to a minor at a recognized and established school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency and persons acting in their capacity as employees or agents of such persons or organizations, and which institution displays, presents or disseminates such material or performance for a bona fide governmental, educational or scientific purpose.

(4) Penalties. Any person who shall be convicted of violating any provision of this section is guilty of a misdemeanor and shall be fined a sum not exceeding Five Hundred Dollars (\$500.00) and may be confined in jail for a definite term which shall be fixed by the court and shall not exceed one (1) month. Each day that any violation of this section occurs or continues shall constitute a separate offense and shall be punishable as a separate violation. Every act, thing, or transaction prohibited by this section shall constitute a separate offense as to each item, issue or title involved and shall be punishable as such. For the purpose of this section, multiple copies of the same identical title, monthly issue, volume and number issue or other such identical material shall constitute a single offense.



John BROZ, Plaintiff-Appellee,

٧.

Margaret M. HECKLER, Secretary of Health & Human Services, A Department of the United States Government, Defendant-Appellant.

Richard D. HOLMES, Plaintiff-Appellee,

٧.

Margaret M. HECKLER, The Secretary of Health and Human Services,
Defendant-Appellant.

Corrine LITTLE, Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary of the Department of Health and Human Services, Defendant-Appellant.

Thomas O. JONES, Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary, Department of Health & Human Services, Defendant-Appellant.

Fred SOESBE, Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary of Health and Human Services, Defendant-Appellant.

Nos. 81-7140, 81-7143, 81-7336, 81-7370 and 81-7466.

United States Court of Appeals, Eleventh Circuit.

Dec. 8, 1983.

In each of five cases, denial of social security disability benefits was reversed by the United States District Court. The Secretary of Health and Human Services appealed, and appeals were consolidated.—The Court of Appeals, 677 F.2d 1351, affirmed in part, vacated in part and remanded. Following remand, 103 Sup.Ct. 2421, the Court of Appeals, 711 F.2d 957, affirmed in part, vacated in part and remanded. On

PM-01-	83-0r-	- Data
Tot Reading	AN ORDINANCE	Data to Mayor
Rof. to <u>Fort Oos</u> Comm.	Made the court of the	Data Raiumad
Fublic Fearing 12-12; 12-13-	-83 CITY OF	Data Resubmitted
2nd Reading & Final Passage	MININEAPOLIS	to Council
Counc	il Members Hoyt, White and Scallo	npresent: the following ordina
	ding Title 7, Chapter 139 of the M rdinances relating to Civil Rights	inneapolis
The City Council of the City of Minn	naapolis da ordain as follows:	
Section 1. That	t Section 139.10 of the above-enti	tled ordinance be
amended to read as fo	ollows:	
139.10 Finding.	, declaration of policy and purpos	:å
(a) Findings.	The council finds that discrimina	tion in employment, labor
union membership, hou	using accommodations, property rig	hts, education, public
accommodations and pu	ublic services based on race, colo	r, creed, religion, an-
cestry, national orig	gin, sex, including sexual harassm	ent AND PORNOGRAPHY, af-
fectional preference,	, disability, age marital status,	or status with regard to
public assistance or	in housing accommodations based or	n familial status ad-
versely affects the h	nealth, welfare, peace and safety	of the community. Such
discriminatory practi	ices degrade individuals, foster i	ntolerance and hate, and
create and intensify	unemployment, sub-standard housing	g, undermeducation, ill
health, lawlessness a	and poverty, thereby injuring the	public welfare.
(I) SPECIAL FIN	NOTINGS ON PORNOGRAPHY: THE COUNCI	L FINDS THAT PORTICERAPHY
IS CENTRAL	IN CREATING AND MAINTAINING THE C	IVIL INEQUALITY OF THE
SEXES. POR	RNOGRAPHY IS A SYSTEMATIC PRACTICE	OF EXPLOITATION AND SUB-
ADDINATION OF THE PROPERTY OF	DASTE ON STY UNION DISESSENTIALLY	HADNS WORRDY THE RICATES

AND CONTEMPT IT PROMOTES, WITH THE ACTS OF AGGRESSION IT FOSTERS,

HARM WOMEN'S OPPORTUNITIES FOR EQUALITY OF RIGHTS IN EMPLOYMENT,

EDUCATION, PROPERTY RIGHTS, PUBLIC ACCOMMODATIONS AND PUBLIC SERVICES; CREATE PUBLIC HARASSMENT AND PRIVATE DENIGRATION; PROMOTE
INJURY AND DEGRADATION SUCH AS RAPE, BATTERY AND PROSTITUTION AND
INHIBIT JUST ENFORCEMENT OF LAWS AGAINST THESE ACTS; CONTRIBUTE
SIGNIFICANTLY TO RESTRICTING WOMEN FROM FULL EXERCISE OF CITIZENSHIP AND PARTICIPATION IN PUBLIC LIFE, INCLUDING IN NEIGHBORHOODS;
DAMAGE RELATIONS BETWEEN THE SEXES; AND UNDERMINE WOMEN'S EQUAL
EXERCISE OF RIGHTS TO SPEECH AND ACTION GUARANTEED TO ALL CITIZENS
UNDER THE CONSTITUTIONS AND LAWS OF THE UNITED STATES AND THE STATE
OF MINNESOTA.

- (b) <u>Declaration of policy and purpose</u>. It is the public policy of the City of Minneapolis and the purpose of this title:
 - (1) To recognize and declare that the opportunity to obtain employment, labor union membership, housing accommodations, property rights.

 education, public accommodations and public services without discrimination based on race, color, creed, religion, ancestry, national origin, sex, including sexual harassment AND PORNOGRAPHY, affectional preference, disability, age, marital status, or status with regard to public assistance or to obtain housing accommodations without discrimination based on familial status is a civil right;
 - (2) To prevent and prohibit all discriminatory practices based on race, color, creed, religion, encestry, national origin, sex, including sexual harassment AND PORMOGRAPHY, affectional preference, disability, age, marital status, or status with regard to public assistance with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations or public

services:

- (3) To prevent and prohibit all discriminatory practices based on familial status with respect to housing accommodations;
- (4) TO PREVENT AND PROHIBIT ALL DISCRIMINATORY PRACTICES OF SEXUAL SUB-ORDINATION OR INEQUALITY THROUGH PORNOGRAPHY;
- -(4)-(5) To protect all persons from unfounded charges of discriminatory practices;
- -{5}-(6) To eliminate existing and the development of any ghetros in the community; and
 - (7) To effectuate the foregoing policy by means of public information and education, mediation and conciliation, and enforcement.
- Section 3. That Section 139.20 of the above-entitled ordinance be amended by adding thereto a new subsection (gg) to read as follows:
- (gg) Pornography. Pornography is a form of discrimination on the basis of sex.
 - (1) Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following:
 - (i) women are presented dehumanized as sexual objects, things or commodities: or
 - (ii) women are presented as sexual objects who enjoy pain or humiliation; or
 - (III) women are presented as sexual objects who experience sexual pleasure in being raped; or
 - (iv) women are presented as sexual objects tind up or cut up or mutinlated or bruised or physically hurt; or
 - (v) wemen are presented in postures of saxual submission; or

- (vi) women's body parts including but not limited to vaginas, breasts, and buttocks - are exhibited, such that women are reduced to those parts; or
- (vii) women are presented as whores by nature; or
- (viii) wemen are presented being penetrated by objects or animals; or
 - (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.
- (2) The use of men, children, or transsexuals in the place of women in (1) (i - ix) above is pornography for purposes of subsections (L) -(p) of this statute.

Section 4. That Section 139.40 of the above-entitled ordinance be amended by adding thereto new subsections (\mathcal{L}), (m), (n), (o), (p), (q), (r) and (s) to read as follows:

- (2) <u>Discrimination by trafficking in pomography</u>. The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography:
 - (1) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography but special display presentations of pornography in said places is sex discrimination.
 - (2) The formation of private clubs or associations for purposes of traffficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.
 - (3) Any weman has a cause of action hereunder as a woman acting against the subordination of women. Any man or transsexual who alleges injury

by pornography in the way women are injured by it shall also have a cause of action.

- (m) Coercion into pornogramic performances. Any person, including transsexual, who is coerced, intimidated, or fraudulently induced (hereafter, "coerced") into performing for pornography shall have a cause of action against the maker(s), seller(s), exhibitor(s) or distributor(s) of said pornography for damages and for the elimination of the products of the performance(s) from the public view.
 - (1) <u>Limitation of action</u>. This claim shall not expire before five years have elapsed from the date of the coerced performance(s) or from the last appearance or sale of any product of the performance(s), whichever date is later;
 - (2) Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion;
 - (i) that the person is a woman; or
 - (ii) that the person is or has been a prostitute; or
 - (iii) that the person has attained the age of majority; or
 - (iv) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
 - (v) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pernography; or

- (vi) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or
- (vii) that anyone else, including a spouse or other relative, has given permission on the person's behalf; or
- (viii) that the person actually consented to a use of the performance that is changed into pornography; or
 - (ix) that the person knew that the purpose of the acts or events in question was to make pornography; or
 - (x) that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or
 - (xi) that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or
 - (xii) that no physical force, threats, or weapons were used in the making of the pornography; or
- (xiii) that the person was paid or otherwise compensated.
- (n) Forcing pornography on a person. Any woman, man, child, or transc sexual who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place has a cause of action against the perpetrator and/or institution.

- (o) Assault or physical attack due to cornography. Any woman, man, child, or transsexual who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography has a claim for damages against the perpetrator, the maker(s), distributor(s), seller(s), and/or exhibitor(s), and for an injunction against the specific pornography's further exhibition, distribution, or sale. No damages shall be assessed (A) against maker(s) for pornography made, (E) against distributor(s) for pornography distributed, (C) against seller(s) for pornography sold, or (D) against exhibitors for pornography exhibited prior ENFORCEMENT to the effective date of this act.
- (p) <u>Defenses</u>. Where the materials which are the subject matter of a cause of action under subsections (L), (m), (n), or (o) of this section are pornography, it shall not be a defense that the defendant did not know or intend that the materials were pornography or sex discrimination.
- (q) Severability. Should any part(s) of this ordinance be found legally invalid, the remaining part(s) remain valid.
- (r) /Subsections (L), (m), (n), and (o) of this section are exceptions to the second clause of section 141.90 of this title.

comber 30, 1983, shall be suspended until July 1, 1984 (Tenforcement date") to facilitate training, education, voluntary compliance, and implementation taking into consideration the opinions of the City Attorney and the Civil Rights Commission. No Hability shall attach under (1) or as specifically provided in the second sentence of (o) until the enforcement date. Liability under all other sections of this act shall attach as of December 30, 1983.

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TO. MAY ARREST THE STREET STREET, AND ASSESSED TO STRE	83-0-	DATE
la Recding 11-23-83	AN ORDINANCE	Data to Mayor
Ref. to Govt Ops Comm.	of the	Date Roturned
Public Hearing 12-12: 12-13-83	CITYOF	Data Rosubmitted
2nd Reading & Final Passage	MINICAPOLIS	to Council
A	Aldermen Boot, White and Scallon	presenti the following ordinance:
Amend	ling Title 7, Chapter 141 of the ness relating to Civil Rights: A	Minneapolis Code
The City Council of the City of Minneo	polis do ordain as fallows:	
Section 1. That S	Section 141.50 (L) of the above-	-entitled ordinance be
amended by adding there	eto a new subsection (3) to read	i as follows:
(3) Pornography:	The hearing committee or court	t may order relief, in-
cluding the r	ramoval of violative material, p	permanent injunction
against the s	sale, exhibition or distribution	of violative material,
or any other	relief deemed just and equitable	ie, including reasonable
attorney's fe	àd≤.	
Section 2. That S	Saction 141.60 of the above-enti	itled ordinance ba
amended as follows:		
141.60 Civil act	ion, judicial review and enforce	ement.
(a) Civil	actions.	
(1) A	n INDIVIOUAL ALLEGING A VIOLATIO	ON OF THIS ORDINANCE MAY
65	RING A CIVIL ACTION DIRECTLY IN	COURT.
(2) A	complainant may bring a civil a	action at the following
t	ines:	
-(+)(i) Within forty-five (45) days a	after the director, a re-
	view committee or a hearing of	committee has dismissed
	a complaint for reasons other	r than a conciliation
	agreement to which the comple	ainant is a signator; or

After forty-five (45) days from the filling of a verified complaint if a hearing has not been held pursuant to section 141.50 or the department has not entered into a conciliation agreement to which the complainant is a signator. The complainant shall notify the department of his/her intention to bring a civil action, which shall be commenced within ninety (90) days of giving the notice.

A complainant bringing a civil action shall mail, by registered or certified mail, a copy of the summons and complaint to the department and upon receipt of same, the director shall terminate all proceedings before the department relating to the complaint and shall dismiss the complaint.

No complaint shall be filed or reinstituted with the department after a civil action relating to the same unfair discriminatory practice has been brought unless the civil action has been dismissed without prejudice.

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GOVT GPS - Your Committee, to whom was referred ordinances amending Title 7 of the Minneapolis Code of Ordinances, to add pornography as discrimination against women and provide just 8 equitable relief upon finding of discrimination by hearing committee of the Civil Rights Commission, and having held public hearings thereon, recommends that the following ordinances be given their second readings for amendment and passage:

- a. Ordinance amending Chap 139 relating to Civil Rights: In General;
- b. Ordinance amending Chap 141 relating to <u>Civil Rights: Administration</u> and Enforcement.

Approved:

Chairman

APPENDIX*

STATUTE	DEFINITION	Solicitation	Act	Lostenng	Asassanci	Patron	Fornication	heterose suai	sensual Sodo	homosexua
NA. CODE (III. 13A \$ 13A-11- 9(a)(1978) Alasama	loiters or remains in a public place for the purpose of engaging in or soliciting another person to engage in prostitution or deviate sexual intercourse	х		X				x .	§ 13A-0-65	×
Aska STAT. § 11 66 100	engages in or agrees or offers to engage in sexual conduct in return for a fee	Х	X					х	§ (1.40.120	
RIZ. REV. STAT ANN § 13- 3211 (1978) ARIZINIO	engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement	§ 13.2905	x					×	§ 13-1411 .	×
1975) A R. KONNON	in return for or in expectation of a fee he engages in or agrees or offers to engage in sexual activity	х.	X	§ 41-2914		§ 41-3003			§ 41-1913	
AL. PENAL CODE \$ 647(b) (Decring Supp. 1979) California	solicits or engages in any lewd act between persons for money or other consideration	х	×				·			
OLO. REV. STAT. § 18-7-201 (1978) Colonado	performs, offers, or agrees to perform any act of sexual intercourse or any act of deviate sexual inter- course, with any person not his spouse, in exchange for money or other thing of value.	§ 18-7-202	×			§ 18-7-205				

Industed and Modified from Rosenbleet & Pariente. The Prostitution of the Criminal Law, 11 Am. Calm. L. Rev. 373, 422-26 (1973).

								Consensual Sodi	VMV
STATUTE	DEFINITION	Solicitation	Act	Lostering	Vagrancy	Patron	Fornication	heterosexual	homosexua
ONN. GEN. STAT. § 534-82 (1979) CONVICTOR	engages or agrees or offers to engage in sexual conduct with another person in return for a fee	·x	х			§ 53a-83			
EL. CODE ANN tit. 11. § 1342 (1974) Delainnin	engages or agrees or offers to engage in sexual conduct with another person in return for a fee	х	x			§ 1343			
C. CODE ANN § 22-2701 (1975) Diotrict Columnia	invite, entice, persuade or address for the purpose of inviting, enticing or persuading any person for the purpose of prositions or any other immoral or lewd purpose	x					§ 22-1002	§ 22-3502 X	x
EA. STAT. ANN. \$796.07(1Xa) Floxica 796.07(3Xa) (West 1976)	giving or receiving of the body for sexual intercourse for hire and the giving or receiving of the body for licontious sexual intercourse without hire to offer to commit, or to commit, or to engage in, prostitution, lewd- ness, or assignation	x	x				§ 79명.03	§ 800.02	
A. CODE ANN. § 26-2012 (1977) G. 20-2212	performs or offers or consents to perform an act of cesual inter- course for money	x	х				§ 26-2010	§ 26-2002 X	X
AWAIL REV STAT \$712-	engages in or agrees or offers to the or of section conductions consists person to entire the time								
DAHO CODE 3 18-5613 (Supp 1978) I 2 200	(a) engages in or offers or agrees to engage in sexual conduct in return for a fee (b) is an inmate of a house of prostitution	x	Х			§ 13-5614	§ 15-6m)}	X § 15-6605	х

§ 702.17

§ 21-3505

§ 510.100

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STATUTE	DEFINITION	PROHIBITS:					_		nsensual Sod	
\$ 17A-853-A (1979)	engaging in or agreeing to engage in or offening to engage in sexual intercourse or a sexual act in return for a pecuniary benefit engaging in prostitution	Solicitation	Act X	Lostering	Vagrancy	Patron	Formation	heterosexual		homosexu
1D. ANN. CODE an. 27 § 16 (definition) § 15 (Supp. 1979) Have bad	offering or receiving of the body for sexual intercourse for hire (e) procure or solicit for prostitution (g) engage in prostitution	x	x					Х	§ 553 § 554	х
IASS. GEN. LAWS ANN. ch.272. § 8 § 53 (West 1968) HOLLSONIA	solicits for a prostitute common night walkers, prostitutes, may be punished	x		x	X		ģ 18	Y	§ 34	х
Michigan	any person who shall accost, solicit or invite another in any public place or from any vehicle or building to commit prostitution	· x		-		§ 28.704		x	§ 28 570	х
11NN. STAT. ANN \$ 609 325 \$ 609.725 (West 1979) HIMMEZOQ	engaging in or offering or agreeing to engage for hire in sexual penetra- tion vagrancy: a prostitute who losters on the streets or in a public place with intent to solitor	x	х	×	X	§ 609 32(4)		Х	§ 604 243	х
(1972)	it shall be unlawful to engage in prostitution or aid or abet prostitution or to proceed the party of the purposes of prostitution.	×	X				ĝ 77-29-1	Y	Basisaisa	×
10. ANN STAT § 597.010(2) (definition) (definition) (description)	engages or offers or agrees to engage in sexual conduct in return for something of value prohibits prostitution	x	x			§ 567 030		\$ 500 090	x	- Indian year

PROHIBITS

\$ 11-15

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§ 14.83

§ 14.33

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§ 11-18

3 35-45-43

X (included

in def.)

\$ 21-3515

DEFINITION

(c) lotters in or within view of any public place for the purpose of being hired to engage in sexual conduct

performs, offers or agrees to perform sexual intercourse or deviate sex-ual conduct for money

performs, or offers or agrees to per-form, sexual intercourse or devi-ate sexual conduct for money or other property

sells or offers for sale his or her

services as a partner in a sex act, or who purchases or offers to purchase such services

performing an act of sexual inter-course for hire or offering or agreeing to perform an act of sexual intercourse or any unlaw-ful sexual act for hire

engages or agrees or offers to engage in sexual conduct for a fee

(a) the practice by a person of indis-criminate sexual intercourse with others for compensation (b) solicitation by one person of another with the intent to engage in indiscriminate sexual inter-

course with the latter for compen

STATUTE

L. ANN. STAT. ch. 38, § 11-14 (Smith-Hurd 1979)

D. CODE ANN. \$ 35-45-4-2 (1979) Indianal

WA CODE ANN. § 725 L

AN. CRIM, CODE & CODE OF CRIM. PROC. § 21-3512 (Vernon 1974)

Kansas Y. REV. STAT. \$ 529.020 (1975) Kenniezy

REV. STAT. ANN. § 14.82

Louisiana

Towa

Consensual Sodomy

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3 94-5-505

8 28-219

- § 201 190

§ 2A:143-1

§ 130.38

8 14-177

PRIVACY
ONV
PROSTITUTION

		PROHIBITS:			i			Cons	ensual So	domy
STATUTE	DEFINITION	Solicitation	Act	Loitenny	Vagrancy	Pairon	Fornication	heterosexual		homosexual
N.D. CENT. CODE \$ 121-29-03 Voth Daluta	(1) is an immate of a house of prostitution or is otherwise engaged in sexual activity as a business (2) solicits another person with the intention of being hired to engage in sexual activity	x	×			§ 12.1-27-0s	x	§ 12.1-20-12	x	
OHIO REV. CODE. ANN. § 2907.01 (definition) § 2907.25 (Page 1975)	male or female who promiscuously engages in sexual activity for hire no person shall engage in sexual activity for hire	§ 2907 24	х							
OKLA, STAT, ANN. HLZI \$ 1030 (West Supp. 1979) O Klahma	giving or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire	§ 1029(b)	§ 1029(a)					x	§ 886	x
OR. REV. STAT. § 167.002 (definition) § 167.007 (1977)	male or female person who engages in sexual conduct or sexual contact for a fee (a) engages in or offers or agrees to engage in sexual conduct or sexual conduct or sexual contact in return for a fee (b) pays or offers or agrees to pay a fee to analyze on sexual conduct or sexual conduct or	x	x			×				
18 PA. CONS. STAT. ANN. § 3902(1) (Puriton Supp 1979) Pency Vania	(1) is an inmate of a house of prossitution or otherwise engages in sexual activity as a business. (2) lotters in or within view of public place for the purpose of being bired to engage in sexual activity.	x	х	x		हे इस्ताइ(८)		х	8 3124	х

PROHIBITS

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3 2A:170-5

§ 30-9-3

§ 230.03

\$ 14-184

DEFINITION

engages in or agrees or offers to engage in sexual intercourse for compensation

all prostitutes and tenants of houses used for prostitution are vagrants

every person who solicits any act of prostitution is a vagrant

solicits or engages in sexual penetra-

giving or receiving of the body for sexual intercourse for hire, and the giving or receiving of the body for indiscriminate sexual intercourse without hire (e) procurse or solicits for the pur-pose of prostitution (g) engages in prostitution

engaging in or offering to engage in sexual intercourse for hire

engages or agrees or offers to engage in sexual conduct in return for a fee

loitering for the purpose of prostitu-tion

offering or receiving of the body for sexual intercourse for hire or for indiscriminate sexual intercourse without hire soliciting or engaging in prostitution is illegal

tion or sexual contact in return for consideration

STATUTE

SIONT, REV CODES ANN

(1975) としています。 (1975) としている (1975) にしっている (

EV. REV. STAT. § 207.030 (1977) Nevada

H REV. STAT. ANN. § 645:2 (Supp. 1977) New Homepshine

New Jerry § 24:133-2 (West 1979)

J. STAT. ANN. § 2A:133-1 (definition)

I.M. STAT. ANN. § 30-9-3 (1978) NOW HIX ICD

Y. PENAL LAW § 230 00

§ 240.37 (McKinney 1980)

ğ 14-204 (1969)

new York

.C GEN. STAT. § 14-203 (def-

North Continia

Consensual Sodomy
Fornication heterosexual homoseceal

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§ 11-10-1

§ 16-15-120

§ 39-707

§ 21.06

	1	PROHIBITS:							
STATUTE	DEFINITION	Solicitation	Act	Luitering	Vagrancy	Patron	Fornication	Consensual Su heterovexual	domy homosexual
UTAH CODE ANN. § 76-10-1302 (1978)	(a) engages or offers or agrees to engage in sexual activity with another person for a fee	x	x			§ 76-10-1303	§ 76-7-104	§ 76-3-44)	,
Vtah	(b) is an immate of a house of prostitution (c) lotters in or within view of any public place for the purpose of being hired to engage in sexual activity			x				х	х
VT. STAT. ANN. tic. 13. § 2031 (definition) V ev m (p. 4) § 2532 (1974)	offering or receiving of the body for sexual intercourse for hire and for indiscriminate sexual intercourse without hire it is unlawful to procure or solicit for prostitution, or engage in prostitu- tion	x	x						
VA CODE § 18 2-346 (Supp 1974) Vinginia	any person who, for money or its equivalent, commits adultery or formication or offers to commit adultery or formication and there-after does any substantial act in furtherance thereof, shall be guilty of prostitution		x				§ 13 2-344	§ 18 2-361	x
19435030 (1917) Washing Fa	engliges or agrees or offers a looking as sexual conduct with another person for a fee	Х	1						
W VA. CODE 3 51-8-5 (1977) West Vinginia	any person who shall engage in prot- utution or who shall solicit any other person for prostitution	x	х				8 01-3-)		

PROHIBITS

Solicitation

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Lostering

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§ 39-4701

Vagrancy

§ 39-4701

Patron

§ 22-23-9

X

611-63

§ 16-15-60 § 16-15-80

DEFINITION

It shall be unlawful to:

to lotter in or near any thoroughfare or public or private place for the purpose of soliciting or engaging in unlawful sexual intercourse or to commit or induce another to commit such act.

(1) engage in prostitution
(2) aid or abet prostitution
(3) procure or solicit for the purpose of prostitution

(1) is an inmate of a house of prostitution or otherwise engages in sexual activity for a fee (2) lotters in view of any public place for the purpose of being hired for a sex act

the giving or receiving of the body for sexual intercourse for hire or for licentious sexual intercourse without hire it shall be unlawful to engage in or aid and abet or solicit for prosti-tution

(1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or (2) solients another to engage in sexual conduct for hire an offense is established under (ayl 1) whether the actor is to receive or pay a fee, under (ayl 2) whether the actor solicits a person to hire him or offers to hire the person solicited

STATUTE

*.I. GEN LAWS § 11-34-5 (Supp. 1979)

Rhode Is land

C. CODE (1976)
South Complina

D. CODIFIED LAWS ANN. § 22-23-1 (Supp. 1978)

South Dalota

ENN. CODE ANN. § 39-3501

TLANEWER

EX. PENAL GODE ANN. (il.). § 43.02(a)

§ 45.02(b) (Vernos Supp. 1978)

Texas

3 39-3502 (1975)

STATUTE	DEFINITION	Solicitation	Act	Lostering	Vagrancy	Patron	Fornication	Consensu heterosexuai	al Soliomy homosexua
WIS. STAT. ANN. § 944 30 (West Supp. 1979)	has or offers to have or requests to have nonmarital sexual inter- course or an act of sexual perver- sion for any thing of value, any inmate of a house of prostitution	x	×			§ 944.31	§ 944.15	§ 9.	44.16 · ` X
WYO. STAT. \$ 6-5-106 NYUMWAS \$6-5-110 (1977)	giving or receiving of the body for sexual intercourse for hire or for indiscremente sexual intercourse without hire any female who frequents or lives in a house of prostitution or com- mits fornication for hire shall be deemed a prostitute	x .	x						

CASE COMMENTS

ELEVENTH AMENDMENT DOES NOT PRECLUDE SUIT AGAINST ONE STATE IN THE COURTS OF A SISTER STATE NEVADA V. HALL, 440 U.S. 410 (1979)

In Nevada v. Hall¹ the United States Supreme Court further limited the scope of the already waning doctrine of sovereign immunity in holding that a state is not constitutionally immune from suit in the courts of a sister state.

Respondents, California residents, brought suit in a California state court for damages against the State of Nevada for injuries sustained in an automobile accident. Respondents' vehicle collided on a California highway with a vehicle owned by the University of Nevada and operated on official business.² Nevada unsuccessfully appealed to the United States Supreme Court from a decision of the California Supreme Court holding it amenable to suit in the California courts.³

The trial court awarded respondents \$1,500,000 in damages, the California Court of Appeals affirmed,⁴ and the California Supreme Court denied review. Nevada again appealed to the United States Supreme Court, which held: The eleventh amendment⁵ to the United States Constitution does not preclude suit against a state in the courts of another state, nor does the full faith and credit clause⁶ require limitation of any judgment rendered against the defendant-state to an amount fixed by its statutes⁷ if the limit is incompatible with the forum state's

I. 440 U.S. 410 (1979)

^{2.} Id. at 411-12.

^{3.} Hall v. University of Nev., 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972), cert. denied, 414 U.S. 820 (1973).

^{4.} Hall v. University of Nev., 74 Cal. App. 3d 280, 141 Cal. Rptr. 439 (1917).

^{5.} The eleventh amendment states: "The judicial power of the United States shall not be construct to extend to any suit or equity, commenced or prosecuted against our of the United States by citizens of another State, or by citizens or subjects of any foreign State." U.S. CONST, amend. XI.

^{6.} The full faith and credit clause provides: "Full faith and credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

Nevada's statute waiving immunity, at the time respondents' cause of action accrued, limited recovery against the state to \$25,000.

The state of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are

CHAPTER 2907: SEX OFFENSES

Section IN GENERAL 2907.01 Definitions. SEXUAL ASSAULTS 2907.02 Rape. [2907.02.1] 2907.021 [Repealed.] 2507.03 Sexual battery 2907.04 Corruption of a minor. 2007.05 Gross sexual imposition. 2907.06 Sexual imposition. 2907.07 Importuning. 2907.08 Voveurism. [2907.08.1, 2007.08.2] 2907.081, 2907.082 [Repealed.] 2907.09 Public indecency. 2907.10 [Actual incarceration.] 2907.11 [Suppress information upon request.] 2907.12 [Felonious sexual penetration.] [2907.12.1] 2907.121 [Repealed.] 2907.13, 2907.14 [Repealed.] [2907.14.1 to 2907.14.5] 2907.141 to 2907.145 [Repealed.] 2907.15 to 2907.20 [Repealed.] [2907.20.1] 2907.201 [Repealed.] PROSTITUTION 2907.21 Compelling prostitution. 2007.92 Promoting prostitution. 2907.23 Procuring. 2407.24 Soliciting. 2907.25 Prostitution. 2007.26 Rules of evidence in prostitution cases. Examination and treatment for venereal disease. 2907.28 [Cost incurred in medical examination.] 2907.29 [Hospital emergency services for victims.] 2007.30 [Repealed.] OBSCENITY 2007.31 Disseminating matter harmful to juveniles. 2907.32 Pandering obscenity. 2907.31.1 [Pandering obscenity involving a minor.] 2907.33 Deception to obtain matter harmful to juveniles. 2507.34 Compelling acceptance of objectionable materials. 2907.35 Presumptions; notice. 2007.38 Declaratory judgment.

2907.38 to 2907.48 [Repealed.] Committee Comment

2907.37 Injunction.

Chapter 2907, deals with three main categories of crimes: sexual assaults and displays; prostitution offenses; and offenses related to the dissemination of obscenity and matter harmful to juveniles.

The principle on which the first group of offenses is founded is that sexual activity of whatever kind between consenting adults in private ought not to be a crime, but that the law ought to proscribe sexual assaults, sexual activity with the young and immature, public sexual displays, and other sexually oriented conduct which carries a significant risk of harming or unreasonably affronting others. Distinctions of sex between offenders and victims are generally discarded. The comparative seriousness of assaultive sex offences is based on one or more of four factors: the type of sexual activity involved; the means used to commit the offense; the age of the victim; and whether the offender stands in some special relationship to the victim. Besides assaultive sex offenses, the first group of sections prohibits; soliciting sexual activity with underage persons; soliciting deviate sexual activity; voyeurism; and public indecency.

්රීතය ප්රාදේඛයන්තෙ කිරීමාගයේ ස්ප්රීකයන් දින ර්යම ස්වීමාර්මාන managina i og a de sia en persona di Sifenses, although the total number of such offenses is reduced. The chapter retains special rules of evidence in prostitution cases, as well as a requirement. for venereal disease examination and treatment.

The offenses and collateral control measures dealing with obscenity and matter harmful to juveniles are similar to former law, although the basic obscenity offense is drafted as a pandering offense to take advantage of Ginzburg v. United States, 383 U.S. 463, 15 L.Ed. 2d 31, 86 S.Ct. 942 (1966). The sections dealing with matter harmful to juveniles are somewhat more stringent than former law, since the definition of what constitutes such matter is not as narrowly drawn as its predecessor.

IN GENERAL

\$2907.01 Definitions.

As used in sections 2907.01 to 2907.37 of the Revised Code:

- (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
- (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or

sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is 'harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest

of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or mudity;

(3) It contains a display, description, or representation of bestildity or extreme or bizarre vio-

lence, cruelty, or brutality;

- (4) It contains a display, description, or representation of human bodily functions of elimination;
- (5) It makes repeated use of foul language; (6) It contains a display, description, or representation in lurid detail of the violent physical to the total and the same than

· (7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or

bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral,

or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.
(G) "Sexual excitement" means the condition

of human male or female genitals when in a state

of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person un-

- der the age of eighteen.
 (J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.
- (K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an

that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or alimony;

(3) In the case of an action for alimony, after the effective date of the judgment for alimony.

HISTORY: 134 v H 511. Eff 1-1-74. 136 v S 144. Eff 8-27-

Not analogous to former RC § 2907.01 (95 v 649), repealed 134 v H 511, § 2, E# 1-1-74.

Committee Comment

"Sexual conduct" is defined to include vaginal and anal intercourse, cunnilingus, and fellatio.

"Sexual contact" is defined as a touching of an erogenous zone of another for the purpose of sexual arousal or gratification.

"Sexual activity" is a shorthand term including both sexual conduct and sexual contact.

A "prostitute" is stated to be a person who promiscuously engages in sexual activity for hire. The definition no longer includes as prostitutes those who engage in indiscriminate sexual activity without hire.

Any material or performance is "harmful to juveniles" if it offends prevailing standards in the adult community as to fitness for juveniles and, in addition, meets any one of seven listed tests.

The definition of obscenity is designed to meet the requirements of Roth v. United States, 354 U.S. 476, 14 OO 2d 331, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957), and cases following in its wake. It spells out what is "obscene" in much greater detail than existing case law, in order to increase the utility of the definition for law enforcement purposes.

The section retains slightly modified definitions of "sexual excitement," "nudity," "juvenile," "material,"

and "performance."

SEXUAL ASSAULTS

§ 2907.02 Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this rection is quite of

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(E) (2) of section 2947.25 of the Revised Code. An offender serving actual incarceration is eligible for time off for good behavior pursuant to section 2967.19 of the Revised Code if confined in a state penal institution, or pursuant to criteria established by the adult parole authority pursuant to division (E) of section 2967.01 of the Revised Code if confined in a state reformatory institution, which in either case shall be calculated on a minimum term which is the period of actual incarceration.

HISTORY: 136 v S 144, Eff 8-27-75.

Not analogous to former RC § 2907.10 [129 v 1426], repealed 134 v H 511, § 2, eff 1-1-74.

8 2907.11 [Suppress information upon request.]

Upon the request of the victim or offender in a prosecution under sections 2907.02 to 2907.07 or section 2907.12 of the Revised Code, the judge before whom any person is brought on a charge of having committed an offense under sections 2907.02 to 2907.07 or section 2907.12 of the Revised Code shall order that the names of the victim and offender and the details of the alleged offense as obtained by any law enforcement officer be suppressed until the preliminary hearing, the accused is arraigned in the court of common pleas, the charge is dismissed, or the case is otherwise concluded, whichever occurs first. Nothing herein shall be construed to deny to either party in the case the name and address of the other party or the details of the alleged offense.

HISTORY: 136 v S 144. Eff 8-27-75.

Not analogous to former RC § 2907.11 [100 v 5], repealed 134 v H 511, § 2, eff 1-1-74.

§ 2907.12 [Felonious sexual penetration.

(A) No person without privilege to do so shall insert any instrument, apparatus, or other object into the vaginal or anal cavity of another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the

age of such person.

(B) Whoever violates this section is guilty of felonious sexual penetration, a felony of the first degree. If the offender under division (A) (3) of division (A) (3) of this section shall be imprisoned for life.

HISTORY: 136 v S 144. Eff 8-27-75.

Not analogous to former RC § 2907.12 [95 v 122], repealed 134 v H 511, § 2, eff 1-1-74.

[§ 2907.12.1] § 2907.121 Repealed, 134 v H 511, § 2 [132 v H 656]. Eff 1-1-74.

§ § 2907.13, 2907.14 Repealed, 134 v H 511, § 2 [GC § 12441; RS § 6836; S&C 407, 426; 33 v 33; 78 v 28; 113 v 502; 129 v 1812; 129 v 1426; 130 v 660]. Eff 1-1-74.

[§§2907.14.1 to 2907.14.5] § \$2907.141 to 2907.145 Repealed. 134 v H 511, § 2 [129 v 1812]. Eff 1-1-74.

§ 2907.15 to 2907.20 Repealed, 134 v H 511, §2 [GC §§12442 - 12447; RS §§3107, 6837 — 6840, 6856; S&C 408, 426, 427, 435, 439, 1632; S&S 263, 279, 457; 29 v 144; 47 v 21; 52 v 28; 60 v 5; 60 v 20, 63 v 70; 66 v 341; 63 v 87; 69 v 67; 109 v 53; 124 v 466; 129 v 1426; 130 v 660; 132 v H 996; 133 v H 49]. Eff 1-1-74.

[§ 2907.20.1] § 2907.201 Repealed, 134 v H 511, §2 [133 v S 346; 134 v S 302]. Eff 1-1-74.

PROSTITUTION

§ 2907.21 Compelling prostituion.

(A) No person shall knowingly:

(1) Compel another to engage in sexual activity for hire;

(2) Induce or procure a minor under sixteen years of age to engage in sexual activity for hire, whether or not the offender knows the age of such

(B) Whoever violates this section is guilty of compelling prostitution, a felouy of the third degree.

HISTORY: 134 v H 511. EH 1-1-74.

Not analogous to former RC § 2907.21 (133 v S 346), repealed 134 v H 511, § 2, eff 1-1-74.

Committee Comment

Division (A) (1) of this section is designed to consolidate and simplify former provisions for compelling another to engage in prostitution. Both male and famale victims are contemplated, and the compulsion uped may be force or the threat of force, duress, or coercion of any kind. For purposes of this section it is immalerial whether the violim is compelled to become a prostitute as defined in section 2907.01 (D). It is sufficient if the victim is compelled only choo to enough ability for inducing or procuring a person in early adolescene to engage in sexual activity for hire, regardless of whether compulsion is used, and regardless of whether the offender knows the age of the victim.

The offenses defined in this section are considered the most serious in the hierarchy of prostitution offenses, because of the element of potential harm to the victim in addition to his or her personal degradation.

Compelling prostitution is a felony of the third degree.

§ 2907.22 Promoting prostitution.

(A) No person shall knowingly:

(1) Establish, maintain, operate, manage, supervise, control, or have an interest in a brothel;

(2) Supervise, manage, or control the activities of a prostitute in engaging in sexual activity for hire:

(3) Transport another, or cause another to be transported across the boundary of this state or of any county in this state, in order to facilitate such other person's engaging in sexual activity for hire;

(4) For the purpose of violating or facilitating a violation of this section, induce or procure an-

other to engage in sexual activity for hire.

(B) Whoever violates this section is guilty of promoting prostitution, a felony of the fourth degree. If any prostitute in the brothel involved in the offense, or the prostitute whose activities are supervised, managed, or controlled by the offender, or the person transported, induced, or procured by the offender to engage in sexual activity for hire, is a minor under the age of sixteen, whether or not the offender knows the age of such minor, then promoting prostitution is a felony of the third degree.

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC \$ 2907.22 (110 v 58), repealed 134 v H 511, § 2, eff 1-1-74.

Committee Comment

This section forbids various acts which, individually and collectively, either constitute or further the business enterprise of prostitution, and is intended to consolidate and streamline a number of former measures directed against establishing and maintaining brothels, as well as those that prohibit trafficking in human flesh. Strict liability as to age is imposed when a victim is in early adolescence, and the ponalty is more severe in such cases. Former language characterizing brothels as public nuisances is omitted, since the same thing is accomplished in existing sections 3767.01 to 3767.99 of the Revised Code.

Promoting prostitution is a felony of the fourth degree. If a victim of the offense is under 15, promoting prostitution is a felony of the third degree.

§ 2907.23 Procuring.

(A) No person, knowingly and for gain, shall

(1) Entice or solicit another to patronize a prostitute or brothel;

(2) Procure a prostitute for another to patronize, or take or direct another at his or her request to any place for the purpose of patronizing a prostitute.

(B) No person, having authority or responsibility over the use of premises, shall knowingly permit such premises to be used for the purpose of engaging in sexual activity for hire.

(C) Whoever violates this section is guilty of procuring, a misdemeanor of the first degree.

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC 8 2907.23 (117 v 821), repealed 134 v H 511, 8 2, Eff 1-1-74.

Committee Comment

This section covers different kinds of conduct commonly termed "pimping," "pandering," or "procuring." It includes not only the professional pimp, but also the beliboy who lines up a call girl for a guest and the taxi driver who takes a passenger to the local bordello at his request, in the hope of receiving a gratuity or commission or both.

Also, the section is designed to reach those persons who knowingly permit sexual activity for hire to occur on property over which they have some control or responsibility, such as landlords and hotelkeepers, even though they might not actually be a party to a prostitution enterprise.

Procuring is a misdemeanor of the first degree.

§ 2907.24 Soliciting.

(A) No person shall solicit another to engage with such other person in sexual activity for hire.

(B) Whoever violates this section is guilty of soliciting, a misdemeanor of the third degree.

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC § 2907.24 (II7 v 821), repealed 134 v H 511, § 2, Eff 1-1-74.

Analogous to former RC \$2905.27 (130 v Pt 2, 143), repealed 134 v H 511, \$2, Eff 1-1-74.

Committee Comment

This section forbids the solicitation of paid sexúal activity, whether the solicitor is the one buying or selling his or her favors. It covers not only professional solicitation by a prostitute, but also any casual solicitation of sexual activity for pay. Former law did not require the element of hire.

Soliciting is a misdemeanor of the third degree.

§ 2907.25 Prostitution.

- (A) No person shall engage in sexual activity for hire.
- (B) Whoever violates this section is guilty of prostitution, a misdemeanor of the third degree.

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC 8 2907.25 (117 v 821), repealed

'Analogous to former RC 8 2905.27 (130 v Pt 2, 143), repealed 134 v H 511, \$ 2, Eff 1-1-74.

Committee Comment

This section prohibits promiscuous sexual activity for pay, and as such is narrower than former law which forbade both a single act of sexual intercourse for hire and promiscuous intercourse without hire. In one sense, the section is broader than former law, since it covers the whole range of sexual activity rather than sexual intercourse alone.

Also, this section is aimed only at the prostitute, although the customer might be convicted of complicity under section 2923.03. Under former law, both the prostitute and the customer could be convicted of prostitution as such.

Prostitution is a misdemeanor of the third degree.

§ 2907.26 Rules of evidence in prostitution cases.

(A) In any case in which it is necessary to prove that a place is a brothel, evidence as to the reputation of such place and as to the reputation of the persons who inhabit or frequent it, is admissible on the question of whether such place is or is not a brothel.

(B) In any case in which it is necessary to prove that a person is a prostitute, evidence as to the reputation of such person is admissible on the question of whether such person is or is not a prostitute.

(C) In any prosecution for a violation of sections 2907.21 to 2907.25 of the Revised Code, proof of a prior conviction of the accused of any such offense or substantially equivalent offense is

admissible in support of the charge.

(D) The prohibition contained in division (D) of section 2317.02 of the Revised Code against testimony by a husband or wife concerning communications between them does not apply, and the accused's spouse may testify concerning any such communication, in any of the following cases:

(1) When the husband or wife is charged with a violation of section 2907.21 of the Revised Code, and the spouse testifying was the victim of

the offense;

(2) When the husband or wife is charged with a violation of section 2907.22 of the Revised Code, and the spouse testifying was the prostitute involved in the offense, or the person transported, induced, or produced by the offender to engage in sexual activity for hire;

(3) When the husband or wife is charged with a violation of section 2907.23 of the Revised Code, and the spouse busilying was the prostitute involved in the offense or the person who need the offense or the person who need the offense in code to open in the communication.

(4) When the husband or wife is charged with a violation of section 2907.24 or 2907.25 of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 137 v H 1, Eff 8-26-77.

Not analogous to former RC 8 2507.26 (119 v 554), repealed 134 v H 511, § 2, Eff 1-1-74.

Committee Comment

This section continues from the former law on prostitution certain types of exceptions to the rules of evidence.

As a general rule, evidence of the reputation of a person or thing is inadmissible to show that such person or thing is what he or it is reputed to be, and this would render prosecution of prostitution cases difficult unless investigators could testify that they personally availed themselves of the services of a prostitute or bawdy house. Under this section, however, evidence of a person's reputation is admissible to show that he or she is or is not a prostitute, and evidence of the reputation of a place is admissible to show that it is or is not a brothel.

Also, a general evidentiary rule holds that communications between husband and wife are privileged, and in the absence of waiver spouses are disabled frere testifying against each other. Under this section, the husband-wife privilege is dispensed with in prosecutions for certain types of prostitution offenses. The reason for this exception is in part because the public interest in suppressing prostitution is considered paramount to the confidentiality of the marriage relationship where a pimp and prostitute may be husband and wife. In some respects, the rationale is similar to that for other exceptions to the husband-wife privilege in cases where one spouse is the victim of an offense committed by the other.

§ 2907.27 Examination and treatment for venereal disease.

- (A) When a person is charged with a violation of section 2907.02, 2907.03, 2907.04, 2907.24, or 2907.25 of the Revised Code, the arresting authorities or a court shall cause the accused to be examined by a physician to determine if the accused is suffering from a venereal disease.
- (B) If the accused is found to be suffering from a venereal disease in an infectious stage, he or she shall be required to submit to medical treatment therfor [therefor]. If the accused is found guilty of the offense with which he or she is charged and is placed on probation, a condition of probation shall be that the offender submit to and faithfully follow a course of medical treatment for such venereal disease.
- (C) The fact that the accused was given a medical examination for venereal disease or the results of such examination shall not be admitted in evidence over the objection of the accused, in a prosecution for any of the reliability did division (A) of this

Not analogous to former RC 8 2907.27 (117 v 821), repealed 134 v H 511, 8 2, Eff 1-1-74.

Analogous to former RC § 2905.28 (130 v Pt 2, 144), repealed 134 v H 511, 8 2, Eff 1-1-74.

Committee Comment

This section retains a former measure requiring that persons charged with certain prostitution offenses be subjected to an examination for venereal disease and compelled to submit to treatment if infected.

On the theory that revelations as to any such examination or treatment could amount to compulsory self-incrimination, the section adds a privilege against the evidentiary use of such information.

§ 2907.28 [Cost incurred in medical examination.]

Any cost incurred by a hospital or other emergency medical facility in conducting a medical examination of a victim of an offense under sections 2907.02 to 2907.06 or section 2907.12 of the Revised Code for the purpose of gathering physical evidence for a possible prosecution shall be charged to and paid by the appropriate local government as follows:

(A) Cost incurred by a county facility shall be

charged to and paid by the county;

(B) Cost incurred by a municipal facility shall

be charged to and paid by the municipality;

(C) Cost incurred by a private facility shall be charged to and paid by the municipality in which the alleged offense was committed, or charged to and paid by the county, if committed within an unincorporated area. If separate counts of an offense or separate offenses under sections 2907.02 to 2907.06 or section 2907.12 of the Revised Code took place in more than one municipality or more than one unincorporated area, or both, the local governments shall share the cost of the examination.

HISTORY: 136 v S 144. Eff 8-27-75.

Not analogous to former RC § 2907.28 [117 v 821], repealed 134 v H 511, § 2, eff 1-1-74.

82907.29 [Hospital emergency services for victims.]

Every hospital of this state which offers organized emergency services shall provide that a physician is available on call twenty-four hours each day for the examination of persons reported to any law enforcement agency to be victims of sexual offenses cognizable as violations of sections 2907.02 to 2907.06 or section 2907.12 of the Revised Code. The physician shall, upon the request of any peace officer or presecuting attorney, and with the consent of the reported victim, or upon the request of the reported victim, ex-

physica evidence the process and

shall establish procedures for gathering evidence under this section.

Each reported victim shall be informed of available venereal disease, pregnancy, medical,

and psychiatric services.

Notwithstanding any other provision of law, a minor may consent to examination under this section. Such consent is not subject to disaffirmance because of minority, and consent of the parent, parents, or guardian of the minor is not required for such examination. However, the hospital shall give written notice to the parent, parents, or guardian of a minor that such an examination has taken place. The parent, parents, or guardian of a minor giving consent under this section are not liable for payment for any services provided under this section without their consent.

HISTORY: 136 v S 144. Eff 8-27-75.

Not analogous to former RC § 2907.29 [80 v 38], repealed 134 v H 511, § 2, eff 1-1-74.

§ 2907.30 Repealed, 134 v H511, § 2 [GC § 12450; RS § 6858; S&C 408, 412, 426, 439, 451; 33 v 33; 34 v 10; 37 v 74; 56 v 26; 69 v 68; 124 v 466]. Eff 1-1-74.

OBSCENITY

§ 2907.31Disseminating matter harmful to juveniles.

(A) No person, with knowledge of its character, shall recklessly furnish or present to a juvenile any material or performance which is obscene or harmful to juveniles.

(B) The following are affirmative defenses to a charge under this section, involving material or a performance which is harmful to juveniles but not obscene:

(1) The defendant is the parent, guardian, or

spouse of the juvenile involved

(2) The juvenile involved, at the time the material or performance was presented to him was accompanied by his parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.

(3) The juvenile exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, marriage license, or other official or apparently official document purporting to show that such juvenile was eighteen years of age or over or married, and the person to whom such document was exhibited did not otherwise have reasonable cause to believe that such juvenile was under the age of eighteen and unmarried.

(C) It is an affirmative defense to a charge under this section, involving material or a performance which is obscene or harmful to juveniles, that and control of perferences was builted to as

CHAPTER 32

PROSTITUTION

Sec.	•
13-3201.	Enticement of persons for purpose of prostitution;
13-3202.	Procurement by false pretenses of person for purpose of prostitution; classification
13-3203.	Procuring or placing persons in house of prostitution; classification
13-3204.	Receiving earnings of prostitute; classification
13-3205.	Causing spouse to become prostitute; classification
13-3205.	Taking child for purpose of prostitution; classification
13-3207.	Detention of persons in house of prosticution for debt;
13-3208.	Keeping or residing in house of prostitution; employment in prostitution; classification
13-3209.	Pandering; definitions; methods; classification
13-3210.	Transporting persons for purpose of prostitution or other immoral purpose; classification; venue
13-3211.	Definitions
13-3212.	Child prostitution; classification
13-3213.	Defense
13-3214.	Prostitution; classification

13-3201. Enticement of persons for purpose of prostitution; classification

A person who knowingly entices any other person into a house of prostitution, or elsewhere, for the purpose of prostitution with another person, is guilty of a class 6 felony.

13-3202. Procurement by fatce pretenses of person for purpose of

prostitution; classification

A person who knowingly, by any false pretenses, false representations or other fraudulent means, procures any other person to have illicit carnal relation with another person, is guilty of a class 6 felony.

13-3203. Procuring or placing persons in house of prostitution; classification

A person who knowingly receives money or other valuable thing, for, or on account of, procuring on placing in a house of prostitution, or elsewhere, any person for the purpose of prostitution is guilty of a class 5 felony.

13-3204. Receiving earnings of prostitute; classification
A person who knowingly receives money or other valuable thing from the earnings of a person engaged in prostitution, is guilty of a class 5 felony.

13-3705. Causing spouse to become prostitute: classification A person who knowingly by force, fraud, intimidation or threats, causes his or her spouse to live in a house of prostitution or to lead a life of prostitution, is guilty of a class 5 felony.

Taking child for purpose of prostitution;

A person who takes away any minor from such person's father, mother, quardian or other person having the legal custody of such person, for the purpose of prostitution, is guilty of a class 4 felony.

Detention of persons in house of prostitution for debt;

Classificati

A person who knowingly detains any person in a house of prestitution because of a debt such person has contracted or is said to have contracted, is guilty of a class 5 felony.

JO. Class house prostitution or prostitution enterprise is guilty of a 13-3208. Keeping or residing in house of prostitution; capitographication of prostitution; classification A. A person who knowingly is an employee at a

misdemeanor. B. A person who knowingly operates or maintains_a house of prostitution or prostitution enterprise is guilty of a class 5 felony.

13-3209. Pandering; definitions; methods; classification A person is guilty of a class 5 felony who knowingly:

for purposes of prostitution.

2. Places any porson in a house of prostitution with the intent that such person lead a life of prostitution.

3. Compels, induces or encourages any person to reside with that person, or with any other person; for the purpose of prostitution.
4. Compels, induces or encourages any person to lead a life of

prostitution.

13-3210. Transporting persons for purpose of prostitution or other immoral purpose; classification; venue

through or across this state, any other person for the purposes of prostitution or concubinage, or for any other immoral purposes, is guilty of a class 5 felony. The prosecution of such person may be in any A person knowingly transporting by any means of conveyance, county in which such person is apprehended.

Definitions 13-3211.

For the purposes of this chapter, unless the context otherwise

1. "Employee" means a person who conducts lawful or unlawful business for another person under a master-servant relationship or as an independent contractor and who is compensated by wages, commissions, tips or other valuable consideration. reduires:

2. "House of prostitution" means any building, structure or place used for the purpose of prostitution or lewdness or where acts of

astitution occur.

"Operate and maintain means to organize, design, perpetuate utilities, rent, maintenance costs or advertising costs,

supervising activities or work schedules, and directing the aims of the enterprise.

"Oral sexual contact" means oral contact with the 47

or anus.

at with ring to agreeing or of 5. "Prostitution" means engaging in or agreeing or of engage in sexual conduct with another person under a fee arrang

that person or any other person.

tution association or other legal entity or any group of individuals in fact although not a legal entity engaged in providing pr services.

7. "Sadomasochistic abuse" means flagellation or tork thy or upon a person who is nude or clad in undergarments or in reverting or bizarre costume or the condition of being fettered, bound or pherwise physically restrained on the part of one so clothed. 8. "Sexual conduct" means sexual contact, s

"Sexual conduct" means sexual contact, sexual in: oral sexual contact or sadomasochistic abuse.

manipulating of any part of the genitals, anus or female breat 10. "Sexual intercourse" means penetration into the per 9. "Sexual contact" means any direct or indirect for

or anus by any part of the body or by any object.

13-3212. Child prostitution: classification A. A person commits child prostitution by knowingly: Lausing any minor to engage in prostitution.
2. Using any minor for purposes of prostitution.
3. Permitting a minor under

Permitting a minor under such person's custody or engage in prostitution,

4. Receiving any benefit for or on account of pro-placing a minor in any place of in the charge or custody of for the purpose of prostitution.

5. Receiving any benefit pursuant to an agreement to pin the proceeds of prostitution of a minor.

.icipate

owning, sctivity 6. Financing, managing, supervising, controlling or either alone or in association with others, prostitution involving a minor.

minor 7. Transporting or financing the transportation of through or across this state with the intent that such minor prostitution.

B. Child prostitution is a class 2 felony.

13-3213. Defense

ly, have, with a time of It is a defense to a prosecution pursuant to section 1 - 212, the defendant engaged in the conduct constituting the offer minor of fifteen, sixteen or seventeen years of age and at the offense the defendant did not know and could not reaso known the age of the minor

13-3214. Prostitution; classification

A. A person who knowingly engages, in prostitution is cr

HERETON. class 1 misyemeanor. 6. Nothing in subsection A shall prohibit cities or enacting and enforcing ordinances to suppress and prohibit prohibit. which provide for a punishment which is at least as sti

subsection A.

Germaia



Am. Jur. 2d. — 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity, §§ 1, 2, 16-18.

C.J.S. — 67 C.J.S., Obscenity, § 4.

ALR. — What is "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 ALR 1092.

Criminal offense predicated upon indecent exposure, 93 ALR 996; 94 ALR2d

1353.

Validity, construction, and application of statutes or ordinances relating to decency as regards wearing apparel or lack of it, 110 ALR 1233.

Operation of nude-model photographic studio as offense, 48 ALR3d 1313.

Topless or bottomless dancing or similar - conduct as offense, 49 ALR3d 1084.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 ALR3d 692.

16-6-9. Prostitution.

A person commits the offense of prostitution when he performs or offers or consents to perform an act of sexual intercourse for money. (Code 1933, § 26-2012, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — As to abatement of houses of prostitution, see Ch. 3, T. 41.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DECISIONS UNDER PRIOR LAW

General Consideration

This section is not void for vagueness. Moore v. State, 231 Ga. 218, 201 S.E.2d 146 (1973).

This section is applicable only to "sellers" of sexual intercourse for money. State v. Gaither, 236 Ga. 497, 224 S.E.2d 378 (1976).

This section does not provide that person has to accept money in order to commit offense, but that the proposed act of sexual intercourse be for a consideration of money. Moore v. State, 231 Ga. 218, 201 S.E.2d 146 (1973).

Offense is defined in terms of commercialization: the sale, offer to sell or consent

to sell physical intimacies for money, State v. Gaither, 236 Ga. 497, 224 S.E.2d 378 (1976).

This section does not require state to allege or prove exact amount of money; it requires only that the defendant perform or offer to perform sexual intercourse for money. Anderson v. State, 149 Ga. App. 460, 254 S.E.2d 459 (1979).

This section may be upheld as one to punish for attempt to commit prostitution. Moore v. State, 231 Ga. 218, 201 S.F.2d 146 (1973).

Conviction for committing or agreeing to commit prostitution. — A person may be convicted under this section not only if he actually committed the act of prostitu-

tion but also if he was a party to an agreement to do so. There is no constitutional prohibition against this feature. Moore v. State, 231 Ga. 218, 201 S.E.2d 146 (1973).

Where allegation may be disregarded because surplusage, — Where the accusation stated that the accused "did then and there unlawfully, and with force and arms, offer and consent to perform an act of sexual intercourse for money," since "with force and arms" is not part of this section which makes prostitution a crime and the words are not required in the form prescribed for indictments under § 17-7-54, such an allegation is mere surplusage and may be disregarded. Anderson v. State, 149 Ga. App. 460, 254 S.E.2d 459 (1979); Hicks v. State, 149 Ga. App. 459, 254 S.E.2d 461 (1979).

Name of particular individual solicited for prostitution is not required in order to set forth one of the essential elements of the crime, and any variation in the proof of whom was solicited was immaterial. Shorter v. State, 155 Ga. App. 609, 271 S.E.2d 741 (1980).

Application of section in Atlanta held not to deny equal protection to female prostitutes. State v. Gaither, 236 Ga. 497, 224 S.E.2d 378 (1976).

Sufficient evidence to support guilty verdict. — In a prostitution prosecution where the arresting police officer testified that he began a conversation with the defendant and that during this conversation defendant offered to have sexual intercourse with him for \$100.00, but the

detendant denied having offered to perform sexual intercourse with the arresting officer for any money and presented evidence that she was incapable of having sexual intercourse at that time due to complications from recent surgery, the evidence was sufficient to support the jury verdict of guilty. Lemon v. State, 151 Ga. App. 709, 261 S.E.2d 447 (1979).

Cited in Snead v. State, 127 Ga. App. 12, 192 S.E.2d 415 (1972); Hicks v. State, 234 Ga. 142, 214 S.E.2d 658 (1975); Pace v. City of Atlanta, 135 Ga. App. 399, 218 S.E.2d 128 (1975); Lambert v. City of Atlanta, 242 Ga. 645, 250 S.E.2d 456 (1978).

Decisions Under Prior Law

Editor's note. — In light of the similarity of the issues involved, decisions under Ga. L. 1943, p. 568 (see § 44-7-18), are included in the annotations for this section.

Prostitution includes solicitation of carnal intercourse in unnatural way. — The term "prostitution" as defined by the Legislature does not mean solely sexual intercourse in the natural way, but includes solicitation of carnal intercourse in an unnatural way. Price v. State, 76 Ga. App. 108, 45 S.E.2d 84 (1947).

Indiscriminate illegal intercourse with number of men not necessarily involved.

— "Prostitution" as used in statute relating to solicitation of another for the purpose of prostitution does not necessarily involve indiscriminate illegal intercourse with a number of men. Price v. State. 76 Ga. App. 108, 45 S.E.2d 84 (1947).

RESEARCH REFERENCES

Am. Jur. 2d. — 63 Am. Jur. 2d, Prostitution, §§ 1-3.

C.J.S. — 73 C.J.S., Prostitution, §§ 1-5. ALR. — Power to exact license fees or impose a penalty for benefit of private individual or corporation, 13 ALR 828; 19 ALR 205.

Purpose other than indulgence in sexual intercourse as affecting violation of Mann Act, 73 ALR 873.

White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

16-6-10. Keeping a place of prostitution.

A person having or exercising control over the use of any place or conveyance which would offer seclusion or shelter for the practice of prostitution commits the offense of keeping a place of prostitution when he knowingly grants or permits the use of such place for the purpose of prostitution. (Ga. L. 1943, p. 568, § 1; Code 1933, § 26-2014, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 3.)

Cross references. - As to abatement of roadhouse or similar establishment for houses of prostitution, see Ch. 3, T. 41. As a purpose of prostitution or debauchery or to inducing female person to enter other immoral purpose, see § 43-21-61.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION DECISIONS UNDER PRIOR LAW

General Consideration

To sustain indictment under this section it is necessary to show only that the accused contributed to or aided, directly or indirectly, in maintaining and keeping a lewd house. Shealy v. State, 142 Ga. App. 850, 237, S.E.2d 207 (1977).

Cited in Snead v. State, 127 Ga. App. 12, 192 S.E.2d 415 (1972).

Decisions Under Prior Law

Editor's note. — In light of the similarity of the issues involved, decisions under Ga. L. 1943, p. 568, as it read prior to revision of title by Ga. L. 1968, p. 1249, included in the annotations for this section.

Person cannot legally be convicted of maintaining lewd house unless the proof

shows that the general reputation of the house or its inmates, or both, was that it was a lewd house, and also that fornication or adultery was actually committed in the house. Smith v. State, 88 Ga. App. 465, 76 S.E.2d 735 (1953).

Not error for trial judge to permit state witness to give details of prostitution practiced. — Where the charge is one for violation of this section, it was not error for the trial judge to permit a witness for the state to go into detail as to the type of prostitution and assignation practiced therein over the objection that such evidence unduly tended to inflame and prejudice the jury against the defendant. Saxe v. State, 112 Ga. App. 804, 146 S.E.2d 376 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Disorderly Houses, §§ 1, 2, 8, 11-20, 35. C.J.S. — 27 C.I.S., Disorderly Houses, §§ 1-9.

ALR. - White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostiturion, 161 ALR 356.

16-6-11. Pimping.

A person commits the offense of pimping when he performs any of the following acts:

- (1) Offers or agrees to procure a prostitute for another;
- (2) Offers or agrees to arrange a meeting of persons for the purpose of prostitution;
- (3) Directs another to a place knowing such direction is for the purpose of prostitution;
- (4) Receives money or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or
- (5) Aids or abets, counsels, or commands another in the commission of prostitution or aids or assists in prostitution where the proceeds or profits derived therefrom are to be divided on a pro-rata basis. (Ga. L. 1918, p. 267, § 1; Code 1933, § 26-6201; Code 1933, § 26-2013, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 2.)

JUDICIAL DECISIONS

Cited in Snead v. State, 127 Ga. App. 12, 192 S.E.2d 415 (1972); Sutton v. Garmon, 245 Ga. 685, 266 S.E.2d 497 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 63 Am. Jur. 2d, Prostitution, §§ 4-12.

C.J.S. — 73 C.J.S., Prostitution, §§ 4, 6, 9.

ALR. — White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

Validity and construction of statute or

ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 510

Separate acts of taking earning of or support from prostitute on separate or continuing offenses of pimping, 3 ALR4th 1195.

16-6-12. Pandering.

A person commits the offense of pandering when he solicits a female to perform an act of prostitution or when he knowingly assembles females at a fixed place for the purpose of being solicited by others to perform an act of prostitution. (Code 1933, § 26-2016, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 5.)

JUDICIAL DECISIONS

ANALYSIS

General Consideration Decisions Under Prior Law

General Consideration

Cited in Blanton v. State, 150 Ga. App. 559, 258 S.E.2d 174 (1979).

Decisions Under Prior Law

Editor's note. — In light of the similarity of the issues involved, decisions under Ga. L. 1943, p. 568, (see § 44-7-18), are included in the annotations for this section.

Prostitution includes solicitation of carnal intercourse in unnatural way. — The term "prostitution" as defined by the Legislature does not mean solely sexual

intercourse in the natural way, but includes solicitation of carnal intercourse in an unnatural way. Price v. State, 76 Ga. App. 108, 45 S.E.2d 84 (1947).

Indiscriminate illegal intercourse with number of men not necessarily involved. — "Prostitution" as used in statute relating to solicitation of another for the purpose of prostitution does not necessarily involve indiscriminate illegal intercourse with a number of men. Price v. State, 76 Ga. App. 108, 45 S.E.2d 84 (1947).

RESEARCH REFERENCES

Am. Jur. 2d. — 63 Am. Jur. 2d, Prostitution, § 4.

C.J.S. — 73 C.J.S., Prostitution, §§ 6-8. ALR. — Constitutionality and construction of pandering acts, 74 ALR 311.

White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

Construction of provision of pandering

statute as to placing of female in the charge or custody of another, 54 ALR2d 1178.

Operation of nude-model photographic studio as offense, 48 ALR3d 1313.

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation — modern cases, 77 ALR3d 519.

16-6-13. Penalties for violating Code Sections 16-6-9 through 16-6-12.

A person convicted of any of the offenses enumerated in Code Sections 16-6-10 through 16-6-12 shall be punished as for a misdemeanor of a high and aggravated nature. A person convicted of the offense enumerated in Code Section 16-6-9 shall be punished as for a misdemeanor. (Code 1933, § 26-2015, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1970, p. 236, § 4.)

JUDICIAL DECISIONS

Cited in Sutton v. Garmon, 245 Ga. 685, 266 S.E.2d 497 (1980).

16-6-14. Pandering by compulsion.

A person commits the offense of pandering by compulsion when he by duress or coercion causes a female to perform an act of prostitution and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years. (Code 1933, § 26-2017, enacted by Ga. L. 1968, p. 1249, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. - 63 Am. Jur. 2d, Prostitution, § 8.

C.J.S. — 73 C.J.S., Prostitution, § 7. ALR. - Constitutionality and construction of pandering acts, 74 ALR 311.

White Slave Traffic Act (Mann Act) as

affecting constitutionality or application of state statutes dealing with prostitution, 161 ALR 356.

Construction of provision of pandering statute as to placing of female in the charge or custody of another, 54 ALR2d 1178.

16-6-15. Solicitation of sodomy.

A person commits the offense of solicitation of sodomy when he solicits another to perform or submit to an act of sodomy and, upon conviction thereof, shall be punished as for a misdemeanor. (Code 1933, § 26-2003, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Language used to support conviction. -The term "blow job" is not too vague and lacking in definition to support a conviction of soliciting for sodomy. Anderson v. State,

142 Ga. App. 282, 235 S.E.2d 675 (1977). Cited in Byous v. State, 121 Ga. App. 654, 175 S.E.2d 106 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sodomy, § 13.

C.I.S. — 81 C.J.S., Sodomy, § 14. ALR. — Validity and construction of or ordinance proscribing solicitation for purposes of prostitution,

lewdness, or assignation - modern cases, 77 ALR3d 519.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

16-6-15. Masturbation for hire.

(a) A person, including a masseur or masseuse, commits the offense of masturbation for hire when he erotically stimulates the genital organs of another, whether resulting in orgasm or not, by-manual or other-bodily contact exclusive of sexual intercourse or by-instrumental manipulation for money or the substantial equivalent thereof.

(b) A person committing the offense of masturbation for hire shall be guilty of a misdemeanor. (Code 1933, § 26-2021, enacted by Ga. L. 1975, p. 402, § 1.)

JUDICIAL DECISIONS

This section is not constitutionally overbroad. State v. Johnson, 237 Ga. 276, 227 S.E.2d 345 (1976).

Contact or manipulation must be of genital organs and not other parts of the body. Harwell v. State, 237 Ga. 226, 227

S.E.2d 344 (1976).

Cited in Pace v. City of Atlanta, 135 Ga. App. 399, 218 S.E.2d 128 (1975); Whitehead v. Hasty, 235 Ga. App. 331, 219 S.E.2d 443 (1975).

RESEARCH REFERENCES

ALR. — White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prosti-

tution, 161 ALR 356.

Regulation of masseurs, 17 ALR2d 1183.

16-6-17. Giving of massages in place used for lewdness, prostitution, etc.

- (a) It shall be unlawful for any masseur or masseuse to massage any person in any building, structure, or place used for the purpose of lewdress, assignation, prostitution, or masturbation for hire.
 - (b) As used in this Code section, the term:
 - (1) "Masseur" means a male who practices massage or physiotherapy, or both.
 - (2) "Masseuse" means a female who practices massage or physiotherapy, or both.
- (c) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 402, § 3.)

RESEARCH REFERENCES

ALR. — Regulation of masseurs, 17 ALR2d 1183.

16-6-13. Fernication.

An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person and, upon conviction thereof, shall be punished as for a misdemeanor. (Laws 1838,

L CODE 56

SUBCHAPTER A. PROSTITUTION

§ 43.01. Definitions

In this subchapter:

(1) "Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

(2) "Prostitution" means the offense stined in Section 43.02 of this code.

(3) "Sexual contact" means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

(4) "Sexual conduct" includes deviate sexual intercourse, sexual contact, and sexual intercourse

(5) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1979, 66th Leg., p. 373, ch. 168, § 2, eff. Aug. 27, 1979.]

§ 43.02. (Prostitution)

- (a) A person commits an offense if he knowingly:
 - (1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or

(2) solicits another in a public place to engage with him in sexual conduct for hire.

- (b) An offense is established under Subsection (a)(1) of this section whether the actor is to receive or pay a fee. An offense is established under Subsection (a)(2) of this section whether the actor solicits a person to hire him or offers to hire the person solicited.
- (c) An offense under this section is a Class B misdemeanor, unless the actor has been convicted previously under this section, in which event it is a Class A misdemeanor.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1977, 65th Leg., p. 757, ch. 286, § 1, eff. May 27, 1977.]

§ 43.03. Promotion of Prostitution

- (a) A person commits an offense if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he or she knowingly:
 - (1) receives money or other property pursuant to an agreement to participate in the proceeds of prestitution; or
 - (2) solicits another to engage in sexual conduct with another person for compensation.

(b) An offense under this section is a Class A misdemeanor.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1977, 65th Leg., p. 758, ch. 287, § 1, eff. May 27, 1977.]

§ 43.03. Aggravated Promotion of Prostitution

- (a) A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.
- (b) An offense under this section is a felony of the third degree.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.]

§ 43.65. Compelling Prostitution

- (a) A person commits an offense if he knowingly:
 - (1) causes another by force, threat, or fraud to commit prostitution; or
 - (2) causes by any means a person younger than 17 years to commit prostitution.
- (b) An offense under this section is a felony of the second degree.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.]

§ 43.56. Accomplice Witness: Testimony and Immunity

- (a) A party to an offense under this subchapter may be required to furnish evidence or testify about
- (b) A party to an offense under this subchapter may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury.
- (c) For purposes of this section, "adjudicatory proceeding" means a proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.
- (d) A conviction under this subchapter may be had upon the uncorroborated testimony of a party to the

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974.] [Sections 43.07 to 43.20 reserved for expansion]

SUBCHAPTER B. \ OBSCENITY)

§ 43.21. Definitions

- (a) In this subchapter:
 - (1) "Obscene" means material or a performance that:
 - (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex:
 - (B) depicts or describes:
 - (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexu-" in a normal sylphon and arrest bestidit it

- (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
- (C) taken as a whole, lacks serious literary, artistic, political, and scientific value.
- (2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.
- (3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.
- (4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.
- (5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.
- (6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.
- (7) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.
- (b) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

[Acts 1973, 63rd Leg., p. 880, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1975, 64th Leg., p. 372, ch. 163, § 1, eff. Sept. 1, 1975; Acts 1979, 69th Log., p. 1974, ch. 778, § 1, eff. Sept. 1, 1979.]

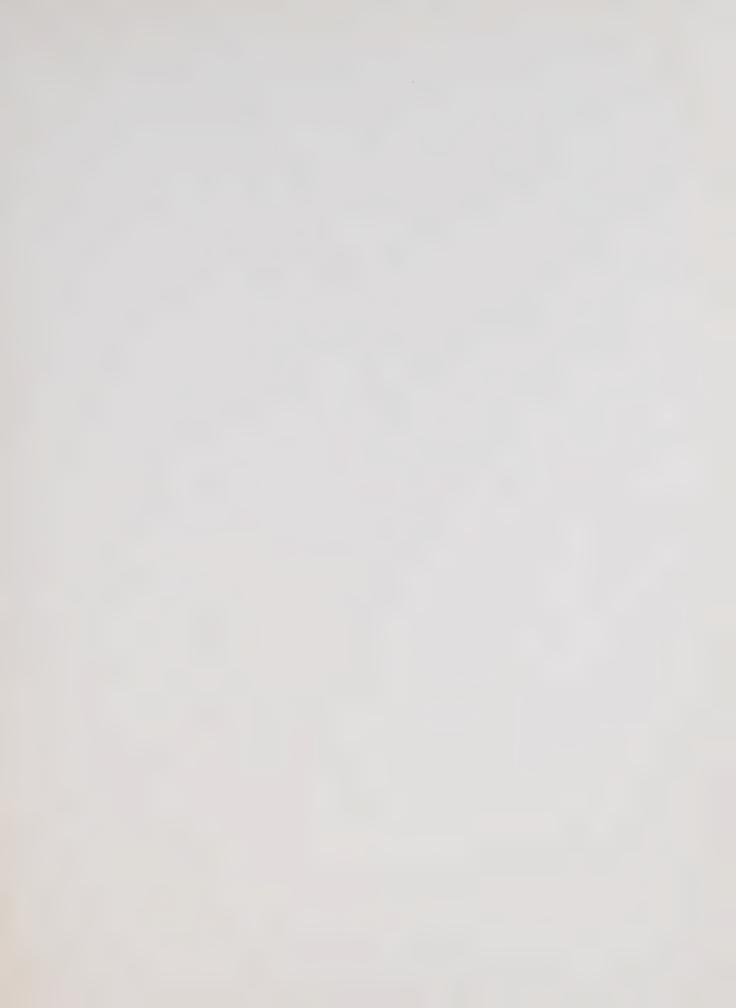
"Sec. 3. If any portion of this Act is declared unimiful ty a court of competent jurisdiction, this declaration does not invalidate any other portions of this Act.

this Act.

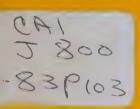
"Sec. 4. This Act applies only to offenses committed on or after its effective date. A criminal autom for an offense committed before this Act's effective later is liver adily to a love an existency before the effective of their fifth is Act, and Sections 40-22 and 30-23, Penal finds, as in exclusive by for the infinite of this Act, are no stored on effect for this purpose as if this Act were not reflect. For the purpose has committed the first the effect, for the propose as if this Act were not in effect. For the purpose has committed the first the effect, for the purpose as of the offense is committed the first the efforts of the offense is committed the first the

FIVE YEAR OVERVIEW (1979-1983)
PROSTITUTION ARRESTS

YEAR	TOTAL	BREAKDOWN BY TYPE SOLICITING/ENGAGING	BY TYPE ENGAGING	BREAKDOWN BY SEX MALE FEMALE	BY SEX FEMALE	BREAKDOWN BY RACE BLACK WHITE	BY RACE WHITE	JUVENIT "S ARRESTED
1979	543	226	317	239	304	300	243	24
1980	547	205	342	217	330	313	234	26
1981	602	293	309	212	390	297	305	41
1982	553	977	112	266	292	232	276	29
1983	576	450	126	198	378	315	261	33
GRAND TOTAL	2,826	1,620	1,206	1,132	1,694	1,507	1,319	153
% OF COND TOTAL ARRESTS	TAL ARRESTS	57%	43%	%07	%09	53%	47%	5%





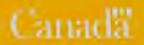


WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION Report # 3

AGREEMENTS AND CONVENTIONS OF THE UNITED NATIONS WITH RESPECT TO PORNOGRAPHY AND PROSTITUTION

D. Sansfaçon

POLICY, PROGRAMS
AND RESEARCH BRANCH
RESEARCH AND
STATISTICS SECTION





Covernment Publications

UNITED NATIONS CONVENTIONS, AGREEMENTS, AND RESOLUTIONS ON PROSTITUTION AND PORNOGRAPHY

by

Daniel Sansfaçon Research and Statistics Section Department of Justice



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INTRODUCTION

The mandate of the Special Committee on Pornography and Prostitution appointed by the Minister of Justice included: (4) to consider, without travelling outside Canada, the experience and attempts to deal with these problems (pornography and prostitution) in other countries including the U.S., E.E.C., and selected Commonwealth countries such as Australia and New Zealand.

Other reports (done as part of the research programme conducted by the Department of Justice in support of this endeavour) will deal with specific countries. However, this report will deal with international policies since it was thought important that the positions taken in international fora also be reviewed. The United Nations and its affiliated bodies -- such as the Social and Economic Council -- stood out as the primary focus for a review of this kind.

Over the years since the early 1900's the League of Nations and then the United Nations have adopted resolutions, agreements, or conventions aimed at the international control of prostitution and pornography. While, as will be discussed more fully below, all these texts do not have the same strength and the same legal binding effect on national states' internal legislation, they nonetheless represent common policy goals for signing parties. A review of these texts not only contributes to reveal the changing nature of the debates on these issues, but also helps evaluate national states' internal policies in light of their international positions on these issues.

This short report will first review the evolution and scope of these texts, as well as Canada's position toward U.N. agreements and conventions on prostitution. A second section will deal with pornography. Concluding remarks will underline their most significant elements in relation to Canada's internal policies on these issues.

I- CONVENTIONS AND AGREEMENTS ON PROSTITUTION

I.1 Historical Overview

In 1904, the first international agreement on prostitution was signed: the "Agreement for the Suppression of the White Slave Traffic" [1]. This Agreement which is mainly concerned with the "procuring of women or girls for immoral purposes (débauche) abroad" (art.1) sets up a series of arrangements whereby governments will: increase their surveillance in railway stations, ports, and en route (art.2); obtain information from prostitutes whenever legally feasible on what "caused them to leave their country" (art.3); entrust these women to public or private charitable institutions until their repatriation (id.); arrange for their repatriation (id.); and pay for their repatriation when necessary (art.4).

This agreement was followed, in 1910, by the "International Convention for the Suppression of the White Slave Traffic" [2] which was signed in Paris (with Great Britain ratifying it in 1912). This convention states that "[w]hoever procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes (débauche), shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries" (art.1). Article 2 adds that where fraud, violence, threats of violence, abuse of authority, or any other other method of compulsion is used on women or girls over age, a similar infraction will be committed and liable to punishment. The concluding protocol defines the age limits as under or over "twenty completed years of age" (Section B). Detention in a brothel, even against a woman's will could not be included however "seeing that it is governed exclusively by internal legislation" (Section D).

Before the League of Nations was dissolved, two further international conventions were signed; the 1921 "International Convention for the Suppression of the Traffic in Women and Children" [3] and the 1933 "International Convention for the Suppression of the Traffic in Women of Full Age" [4]. The 1921 convention, designed "to secure more completely the suppression of the Traffic in Women and Children", modified the 1904 agreement and 1910 convention to include: (art.2) children of both sexes; (art.3) the preparation of offences; (art.5) a new age limit of "twenty-one completed years"; and special provisions on powers to extradite offenders (art.4), on the protection of women and children seeking employment abroad (art.6), and on surveillance measures (art.7).

The Council of the League of Nations appointed two special bodies of experts to report on the conditions in which the international traffic in women and children was conducted. The 1927 enquiry concluded that "the existence of licensed houses is undoubtedly an incentive to traffic, both national and international" [5]. The 1932 committee, building on the same sources but with an expanded mandate supported this conclusion: "the principal factor in the promotion of international traffic in women in the East is the brothel" [6].

In 1933, the "International Convention for the Suppression of the Traffic in Women of Full Age" was signed in Geneva. Although this convention is generally similar to the previous conventions of 1910 and 1921, it added a formal provision allowing signing countries to exchange information concerning the offences, offenders, and particulars of extradition or refusal of admission (art.3) resulting from offences committed on their national territory or on territories under their suzerainety (art.1).

In 1945, when the **United Nations** was established, the 1921 and 1933 Conventions were reconducted by the "International Convention for the Suppression of the Traffic in Women and Children (...) as Amended by the Protocol Signed at Lake Success, New York, on 12 November 1947" [7]. This protocol does not modify the substance of the previous agreements but transfers the powers to the Secretary General of the United Nations and to the countries participating in the United Nations.

In 1949, the "Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others" [8] was adopted by the General

Assembly of the United Nations. This convention states in its preamble:

Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family, and the community (...).

This was the first international convention to clearly condemn prostitution per se. Of even greater significance however is the adoption of the word person rather than "women": it is recognized here for the first time that prostitution is not only restricted to women but applies to all persons even though its practice and exploitation particularly afflict women. The use of the word "person" includes adults as well as children and makes no difference in terms of sex, race, religion, etc..

Articles 1 and 2 define the scope of this preamble as follows:

Article 1 - The Parties to the Present Convention agree to punish any person who, to gratify the passions of another:

1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

2. Exploits the prostitution of another person, even with the consent of that person.

Article 2 - The Parties to the Present Convention further agree to punish any person who:

1. Keeps or manages, or knowingly finances or takes part in the financing of a brothel;

2. Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

In these two articles and in articles 6 and 16, the signing parties agreed to restrict repressive measures only to those who "exploit the prostitution of others" (i.e., pimps and other procurers). While the convention considers prostitution to be an evil, it recognizes that those who prostitute themselves should not be subject to "special registration ... or to any exceptional requirements for supervision or notification" (art.6). Furthermore, signatory States "agree to take or to encourage, through their public or private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution" (art.16).

No other convention on prostitution has been signed since. Other steps have

been taken however to reaffirm the determination of the United Nations to fight pimping (i.e., "the exploitation of the prostitution of others"). In 1959, the Department for Economic and Social Affairs, at the request of the Economic and Social Council, prepared a report proposing a variety of measures to more actively encourage the prevention of prostitution and the rehabilitation of prostitutes. Specifically, this report clearly stated that studies conducted in countries having abolished their licensing system demonstrated that prostitution could account for only a small proportion of venereal diseases. As well, the report indicated that abolishing the regulatory systems could not but only be a first step. Other measures including measures aimed at the maintenance of public order, the prevention of venereal diseases, the suppression of the exploitation of the prostitution of others, the prevention of prostitution, and the rehabilitation of prostitutes were all necessary to effectively combat the traffic in persons.

It is noteworthy that the report, in supporting the abolitionist strategy, refuses to consider prostitution as a punishable offence but at the same time, both in order to maintain public order and to prevent prostitution, states that:

Inasmuch as they constitute a public nuisance, loitering and soliciting for the purposes of prostitution should be proscribed in order to safeguard public order and decency. The prohibition of such public provocation to prostitution should, however, be dealt with by law, and not by police order or administrative regulations. [9].

Prostitution thus is neither to be repressed nor to be tolerated; this difficult balance between abolition and encouraging the social reintegration of prostitutes is the task that the United Nations General Assembly was to urge member states to pursue in coming years.

Two distinct bodies of the U.N., the Commission on Human Rights and the Commission on the Status of Women, jointly worked on the issue of prostitution and the traffic in persons. In 1974, a working group on slavery, created by the Sub-Commission on Discrimination and the Protection of Minorities of the Human Rights Commission, referred to the traffic in women and children as a form of slavery. The working group made various recommendations which were ratified by the Commission. In 1975, the Mexico World Conference on the International Year of Women adopted a resolution explicitly urging governments to increase their efforts to put an end to forced prostitution and the traffic in women, and to promote measures contributing to the rehabilitation of prostitutes. As well, the World Conference on the United Nations Decade of Women, held in Copenhagen in 1980 adopted a resolution which recommended inter alia that the Secretary General should prepare a report on prostitution in the world, its causes, and the socio-economic conditions which underly it. This resolution also invited the Sixth U.N. Congress on the Prevention of Crime and the Treatment of Offenders to make concrete recommendations in regard to the relationship between development, prostitution and exploitation, and traffic in persons.

In 1978, at its 27th session, the Commission on the Status of Women adopted a

resolution (1978/1 (XXVII)) condemning the "shameful exploitation" of the prostitution of others, and requesting the Secretary General to prepare a report on the implementation of the 1949 Convention as well as to prepare a document on the causes and consequences of prostitution and on the socio-economic conditions likely to promote its spread. The same request was again repeated in resolution 1980/4 of the Economic and Social Council. Also in 1980, the Commission on the Status of Women, in its 28th Session adopted a resolution requesting the Secretary General to explain why no report has ever been prepared on the application of the 1949 Convention and reaffirmed its desire that such a report should be prepared. Finally, in its resolution 1982/14, the Commission recommended that a proposal be submitted before the General Assembly for the appointment of a special rapporteur. Following this recommendation, the Secretary General of the U.N. asked Mr. Jean Fernand-Laurent to produce a report on this topic [10]. This report, published in 1983, subsequently led to the adoption by the Economic and Social Council of Resolution 1983/30 for the "Suppression of the traffic in persons and of the exploitation of the prostitution of others". This resolution expressly "invites Member States to sign, ratify, and implement the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others" (operational par.1), thereby reaffirming the basic principles contained in this convention concerning the rehabilitation of prostitutes and the repression of all forms of procuring and exploitation. Moreover, it also invites Member States to "sign, ratify and implement the International Convention for the Suppression of the Circulation and Traffic in Obscene Publications" (operational par.2; this convention is discussed in the section on pornography). Furthermore, this resolution recommends that member states should draw up policies aimed at:

- (a) Preventing prostitution by moral education and civics training, in and out of school;
- (b) Increasing the number of women among the State's personnel having direct contact with the populations concerned;
- (c) Eliminating discrimination that ostracizes prostitutes and makes their reabsorption into society more difficult;
- (d) Curbing the pornography industry and the trade in pornography and penalizing them very severely when minors are involved;
- (e) punishing all forms of procuring in such a way as to deter it, particularly when it exploits minors;
- (f) facilitating occupational training for and the reabsorption into society of persons rescued from prostitution;

As can be seen from this historical overview, a shift in perspective occured with the 1949 Convention. Whereas previous conventions/agreements dealt with the suppression of the traffic in women and children, this Convention focussed on all who suffer from prostitution and also addressed measures to suppress the exploitation of the prostitution of others. Clearly, this was meant to

condemn procuring and other forms of enticing someone into prostitution not only as they occur between different countries, but also as they occur within nation states. In that respect, while recognizing that its conventions do not absolutely determine national legislations, the U.N. nonetheless exerted pressures on signing parties to avoid legislation prohibiting prostitution itself.

I.2 The scope of these conventions

These agreements and conventions should be read within the context of the International Bill on Human Rights [11], (which includes the Universal Declaration on Human Rights, and the International Covenants on Economic, Social, and Cultural Rights, and on Civil and Political Rights [12]), of the 1979 Convention on the Elimination of all Forms of Discrimination against Women [13], and of the 1926 Convention on Slavery [14].

The International Declaration on Human Rights states in article 4 that "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms". Article 16 reaffirms the family as the natural and fundamental element of society. As well, articles 22, 23, and 26 recognize human rights to economic, social and cultural security through work and social services.

Similarly, the International Covenant on Economic, Social and Cultural Rights recognizes the right to work, "which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (art.6.1). Interestingly, this article could be interpreted to mean both the right of women to equal employment opportunities, and the right of prostitutes to ply their trade as it may be seen as a form of work. Article 10.1 further recognizes the family as the fundamental unit of society and 10.3 states that "[c]hildren and young persons should be protected from economic and social exploitation". Articles 11 on the right to an adequate standard of living, and 12 on physical and mental health, are also pertinent when considering resolutions and conventions on prostitution.

The Convention on the Elimination of all Forms of Discrimination Against Women reaffirms the principle of equality of men and women in all spheres of life, and invites State Parties to the Convention to, among others, "repeal all national penal provisions which constitute discrimination against women" (art.2(g)). Furthermore, article 6 says that "State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".

In his book on the **Legal Effects of United Nations Resolutions** J. Castaneda writes the following about the Universal Declaration on Human Rights:

[it] is not a binding document to which one may attribute the effect of creating obligations for the states; nor can one ascribe to it the character of a resolution declaratory of pre-existent customary rules [15].

However, the situtation is more complex than might seem superficially. While

the resolutions adopted by the United Nations do not supersede national legislation, they nonetheless create

a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon states. [16]

While the debate on the binding effect of the Declaration may not yet be solved in international law theory, this text nonetheless is seen more and more as creating customary obligations. In any case,, the Declaration is the expression of a "common ideal" [Castaneda, op.cit.: 195] and the concrete manifestation of the will of State Parties that these fundamental rights now belong to the international realm. Therefore, the Declaration strengthened "the view [that human rights] is no longer outside the international sphere, and thus exempt from international action" [ibid]. The same reasoning is even more applicable to resolutions or Conventions on prostitution which are of a more limited scope than the Universal Declaration on Human Rights.

In effect, resolutions on the traffic in women and children and on the exploitation of the prostitution of others do not exert the same binding effect on national legislations than do conventions. However, it is strongly expected that nation states will conform their laws and practices to the principles adopted in the resolutions.

Mr. Fernand-Laurent's report defines the three types of legislative approaches taken by various contries to fight prostitution. Prohibitionists condemn prostitution per se and in their fight against its manifestations will usually discriminate against the prostitutes as they rarely punish the client. Regulationists tolerate prostitution but by regulating its manifestations "relegate the prostitute to a marginal position and make it virtually impossible for her to escape" [op.cit., p.: 16]. Finally, in the abolitionist approach:

prostitution is considered incompatible with the dignity of the human person, it is not prohibited, for it is regarded as a personal choice, and hence a private matter; the aim, instead, is to abolish the exploitation of prostitution (id., p.: 17).

Clearly, the 1949 Convention is abolitionist. Yet, some signing countries to this Convention have adopted regulatory legislations on prostitution (e.g., Mexico, Venezuela, Brazil, Ecuador, Morocco, etc.) which, in a sense, legitimize prostitution. Others (e.g., U.S.S.R., India, Yougoslavia, Denmark, Algeria, etc.) are strong prohibitionists, making it very likely that all the participants in the trade --including the prostitute-- are subject to legal repression. Finally, other signing countries such as France, Albania, Romania, Poland, are declared abolitionists. However, their national legislations and/or enforcement practices contradict one or another of the

provisions of the Convention. (One may legitimately suspect that this is the case of most abolitionist countries, whether they have adhered to the 1951 Convention or not.) While they claim that prostitution, even though unacceptable, is not forbidden and that its exploitation is the focus of repressive measures, this discourse is contradicted by everyday enforcement practices, street solicitation remaining the major activity repressed. This position also raises the questions of police registration of prostitutes and of the obligation for prostitutes to file income tax returns, measures usually accompanying abolitionist legislations [17]. Even for abolitionist countries then, an adequate and coherent national policy seems to remain more in the domain of wishes than reality.

The objective proposed by the 1949 United Nations Convention which is the abolition of prostitution by eliminating its exploitation (pimping), and by the adoption of measures encouraging the rehabilitation of prostitutes is rarely embodied in national legislations on prostitution. When read in the context of the other major conventions and covenants, these measures imply the extinction of all forms of discrimination against women, the full equality of men and women, the possibility for women to find decent employment and to have equal access to social resources and wealth. The 1983 report of the Special Rapporteur and the subsequent resolution of the Economic and Social Council (1983/30) recognize the existence of this gap between national and international policies. Moreover, a recent resolution adopted by the General Assembly (A/RES/38/107; Prevention of Prostitution) "[u]rges Member States to take all appropriate human measures, including legislation, to combat prostitution, exploitation of the prostitution of others and all forms of traffic in persons" (par.1). This will be discussed further below in the review of Canada's position with regards to the various texts adopted.

To summarize, the scope of the resolutions/conventions/agreements adopted by the League of Nations and later the United Nations has shifted from an initial concern about the international traffic and slavery of women and children, to a concern for the equality of women, the respect of their human rights and those of children, and for an end to the exploitation of the prostitution of others. What impacts this shift may have had on an international level is difficult to assess, and falls outside the scope of this short study. We shall, however, attempt to determine Canada's position on this issue.

I.3 The Canadian Position

Canada has signed and is a party to the following conventions: the International Agreement on the Suppression of the White Slave Traffic (1904), the International Convention on the Suppression of the White Slave Traffic (1910), the Protocol amending the Agreement of 1904 and the Convention of 1910 (1949), the Convention for the Suppression of the Traffic in Women and Children (1921), and the Protocol to amend the Convention for the Suppression of the Traffic in Women and Children of 1921 (1947).

However, Canada is not a party to the following conventions: the Convention for the Suppression of the Traffic in Women of Full Age (1933), and its amending Protocol (1947), and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

(1949) and its Final Protocol.

It is often mentioned that since Canada is a party to all the conventions/agreements prior to 1949 (except for the 1933 convention), and to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, and since the 1949 Convention is in essence a consolidation of the previous ones [18], it would not be essential that Canada become a party to that particular convention.

The consolidation argument is somewhat fallacious. As already discussed, the 1949 Convention introduces the notion of the fight against the exploitation of the prostitution of others, and lays out a policy for the rehabilitation of prostitutes rather than for their criminalization as is now done in the application of the criminal law. Furthermore, this Convention, by the new terminology it has adopted, insists that prostitution not only refers to female prostitutes. It also refers to the demand for prostitution, i.e., male customers, to those who exploit the prostitution of others (i.e., pimps), and more generally to the economic inequalities discriminating against women in today's societies. This Convention thus brings completely new elements to the international discourse on prostitution. As well, a review of the implications for Canada of the substantial part of the Convention shows that many modifications to Canada's national policy would be necessary to conform to the Convention.

Articles 8, 14, 15, 19, and 21 (with respect to laws of federal competence), and 16 and 20 (with respect to laws of provincial or mixt competence), imply modifications to these laws should Canada sign the Convention. More specifically, article 8 makes procuration an extraditable offence. However, neither part I nor part II of Canada's Extradition Act, RSC 1970, c.E-21, mentions "procuration" as an extraditable offence. Abduction, as defined in Section 248 of the Criminal Code, is not broad enough to be equated with procuration. Although Canada is a party to the 1910 and 1921 conventions this is not sufficient to cover the obligations created under article 8 of the 1949 Convention. To conform with article 8 Canada could either amend the concerned legislation or express a reservation on this article (especially since mention sometimes is made of the (too) wide scope of these offences).

Article 14 creates an obligation for State parties to establish and maintain an information service on the investigation of offences listed in article 8 of the Convention. Canada is already fulfilling part of this requirement under article 1 of the 1904 Agreement on the Suppression of the White Slave Traffic. Similarly, article 15 creates a duty on the parties to provide information to other State Parties on the particulars of the infractions, including search for and any prosecution, arrest, conviction, refusal of admission or explusion of convicted persons. The only obligation imposed on states pursuant to the 1921 convention was to provide information on sentences.

In order to conform with the repatriation clause outlined in article 19(2) of the Convention, Canada would have to expand the provisions of Section 66 and in particular subsection (b) of the <u>Immigration Act</u> (1976). As well, article 21 which provides that information on laws, regulations, and measures taken concerning the application of the convention shall be communicated to the

Secretary General also would require modifications to Canada's practices.

Finally, and maybe more importantly, two articles have a direct impact on provincial legislation: article 16 on the prevention of prostitution and the rehabilitation of prostitutes, and article 20 on the supervision of employment agencies. Article 16 refers to provincial competences in the fields of education, public health, and the administration of justice. Article 20 refers to federal and provincial employment agencies and as such would require consultations with the provinces.

With regards to resolution 38/107 of February 1984 adopted by the General Assembly, Canada's abstention may be explained by the introduction of the expression "combat prostitution". However, other factors, including the overall tone of the originally proposed resolution, probably have to be accounted for in seeking a complete explanation for this decision. The Canadian delegation abstained --along with 24 other countries-- on the following grounds:

- (1) the resolution was fundamentally sexist in nature, assuming as it did that only women could be prostitutes or the subjects of trafficking;
- (2) the resolution, rather than advancing equality for women, implied that women need to be protected; and,

Furthermore, since this resolution focussed only on prostitution as a women problem, when Canada is also concerned with the issue of child prostitution, and therefore not in favour of a resolution dealing only with women prostitution.

To sum up, Canada's abolitionist legislation toward prostitution is relatively attuned to the international conventions/agreements adopted until recently by the United Nations. This country's federative system, its corresponding division of powers, and its prudence with respect to a sometimes vague and overreaching terminology, account for Canada not signing the 1949 Convention and the 1984 resolution. On the other hand, the fact that Canada has signed the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (which is broader than the conventions on prostitution), and is a party to most of the previous conventions on the traffic in women and children and slavery indicates that Canada is concerned with the situation of women and strives to reach a just and equitable policy.

II- CONVENTIONS ON OBSCENITY

II.1 Historical Overview

The League of Nations adopted the Agreement for the Suppression of the Circulation of Obscene Publications in 1910 [19]. This agreement was amended in 1949 by the Protocol signed at Lake Success [20] to come under the umbrella of the United Nations Organization. Article 1 of this agreement created duties on Member States to:

- 1. Centraliz[e] all information which may facilitate the tracing and suppression of acts constituting infringements of their municipal laws as to obscene writings, drawings, pictures or articles, and the constitutive elements of which bear an international character;
- 2. Supply all information tending to check the importation of publications or articles referred to in the foregoing paragraph and also to insure or expedite their seizure, all within the scope of municipal legislation;
- 3. Communicate the laws that have already been or may subsequently be enacted in their respective States in regard to the object of the present agreement.

A second agreement was signed in 1923 [21] and amended at Lake Success in 1947 [22]: The International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications. This Convention is more specific than the 1910 agreement and directly concerned with the discovery, prosecution and punishment of offenders. Article 1 defines a punishable offence as the following:

- 1. For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects;
- 2. For the purposes above mentioned, to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any matter whatsoever to put them into circulation;
- 3. To carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matter or things in any manner whatsoever, or to

distribute them or to exhibit them publicly or to make a business of lending them;

4. To advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly.

Whereas the scope of the prohibition is relatively large, it all depends upon how the term "obscene" is to be defined. In this respect, the texts of the Agreement and of the Convention offer no guidelines. Similar to the previous discussion on the scope of conventions on prostitution, it is left to each Member State's own legislation and judicial practice to define obscenity.

To our knowledge, no other Convention on obscene matters has been deposited with the Secretary General. However the report of the Special Rapporteur (op.cit.: 20) mentions in section 68 the need to fight against pornography in order to adequately prevent prostitution and its exploitation:

Prevention [of prostitution] means ensuring as far as possible equality of access for women and men to training and employment. (...) It also involves imposing limits on eroticism and suppressing pornography, whatever medium it employs (...). It would be illogical to give free reins to what excited the senses, while condemning as immoral the means of assuaging that excitement.

Following the recommendations of this report, Resolution 1983/30 Article 3(d) recommends that Member States draw up policies aimed at "curbing the pornography industry and the trade in pornography and penalizing them severely when minors are involved".

Two other U.N. texts should be mentioned here. The first is the Universal Postal Convention [23] and the second is the International Telecommunications Convention [24]. The Universal Postal Union was first created at the end of the 19th century. Its Constitution, as amended by the 1969 Tokyo Congress provides that the Universal Postal Convention and its Regulations "embody the rules applicable throughout the international postal service and the provisions concerning the letter-post services" (art. 22.3). The Union has as its goals to ensure freedom of transit throughout its territory, to secure the organization and the improvement of postal services, and provide technical assistance to Member States (article 1). The Convention lays down detailed regulations whereby these goals will be attained. In this respect, article 36.4 lists the various articles prohibited for insertion in letter-post items. "Obscene or immoral articles" are included as sub-section (e). Article 36.6 provides that some items, listed in section 4, including obscene or immoral articles, "shall in no circumstances be forwarded to their destination, delivered to the addressees or returned to origin". Furthermore, article 37 authorizes postal administrations of the countries of origin and destination "to submit to customs control, according to the legislation of

those countries, letter-post items, and, if necessary, to open them officially".

The first International Telecommunications Convention was signed in Madrid in 1932. This Convention set up the International Union, its constitution and procedures. It also included general provisions recognizing telecommunications as a public service (article 22). Moreover, it provided that "[t]he signing governments reserve the right to stop the transmission of any private telegram or radiotelegram which might appear dangerous to the safety of the state or contrary to the laws of the country, to public order, or to decency...' (art.26.1; we underline). The same provision also applied to telephone communications (26.2). A second Convention was adopted in Montreux in 1965 and revised in Malaga-Torremolinos in 1973. This overhaul was made necessary by the profound changes occuring in telecommunications methods and capacities. While still recognizing telecommunications as a public service, the new Convention modified the terms of the article on the stoppage of telecommunications. Article 19.1 is now limited to telegrams, whereas 19.2 reads: "[m]embers also reserve the right to cut off any private telecommunications which may appear dangerous to the security of the State or contrary to their laws, to public order or to decency" (we underline).

II.2 The Scope of these Conventions

Generally speaking, the remarks made about the scope of conventions on prostitution apply equally for conventions on obscenity. In other words, these conventions have a relative binding effect on Member States' internal laws and practices. As well, moral condemnation and the capacity of other States to express denunciation contribute to strengthening these conventions. However, particular problems are raised with respect to conventions on obscenity which relate to the term itself. Whereas prostitution and the exploitation of the prostitution of others can be defined relatively uniformly between States --which is not meant to imply that national statutes will bear similar definitions, nor, if they did, that they would be enforced similarly-obscenity and the constituents of such infractions are bound to widely vary. Given that infractions mentioned in article 1 of the 1923 Convention can be prosecuted in the country where the offence was committed, this interpretation problem is even more acute. The same reasoning also applies to the terms "decency" and "immoral" used in the Conventions on Telecommunications and on the Postal Union respectively.

The call for a curb on pornography expressed in Resolution 1983/30 also raises the issue of how to define the term. Is pornography to be equated with what Mr. Fernand-Laurent, in his discussion of the role of UNESCO and more precisely of the school, calls the "stereotypes that debase women and present them as being destined for the physical pleasure of men" (op.cit. p.: 31)? The Special Rapporteur further adds that Member States should "recognize the necessary distinction between the erotic and the obscene, and (...) declare war on pornography at least that which is most likely to defile the female body and which, by separating sexual relations from affective relations, puts them at a less than human level" (id., p.: 32). As is well known, in practice, this distinction is very difficult to draw.

II.3 The Canadian Position

Canada's position with regards to obscenity is far less complex than that for prostitution. Canada is a party to all the Conventions signed and deposited with the Secretary General, and is a Member to the Universal Postal Convention and the International Telecommunications Convention. Canada's abstention from voting on resolution 1983/30 has already been discussed in the section on prostitution.

Canada's legislation is more attuned to the principles set forth in these Conventions than in those dealing with prostitution. They have not raised the same problems of the Constitutional division of powers, and of amending the Criminal Code and other federal statutes. Indeed, the Criminal Code uses the term "obscenity" and our legal practice has constantly sought to specify its meaning.

CONCLUSION

Up to and including the report of the Special Rapporteur, the trend in relation to prostitution clearly has been, in the United Nations and related organizations, to deal with prostitution as a social -- rather than moral -- problem and to focus on the repression of procuring and on the rehabilitation of prostitutes. These conventions are part of a larger set of U.N. policies encouraging states to take concrete actions in order to assure equality to women in all realms of social life. It is believed that women are pushed into prostitution by reason of social and economic inequalities maintained by male domination. The same argumentation recently included pornography as another manifestation of sexist and male dominated societies, and condemned it as such. Thus, while it was strongly recommended that states avoid adopting repressive measures directed at prostitutes themselves, it was also recommended that obscene material be prohibited.

Canada's criminal laws and social policies have generally been congruent with these international policies. The fact that Canada has not signed the 1949 Convention on prostitution must not be interpreted as a sign that the national policies substantially differed from those put forth in the U.N. It may rather be a recognition that, until such time as its internal policies totally correspond to those of the Convention, Canada will not sign the Convention. In that respect, our law enforcement practices -- not to mention public opinions -- have (and still are) focussed on the prostitute rather than on the pimp or even the customer, as the primary target, even though the criminal law has been interpreted so liberally as to make enforcement of the solicitation provision difficult.

But that Canada has not signed this Convention may also reveal how difficult it is to strike a balance between competing interests in this area. As noted by the Special Rapporteur, designing a coherent national policy probably has not yet been achieved by any state. Answers to such difficult questions as registration of prostitutes -- for police investigation purposes -- and taxation of prostitutes' revenues, first need to be answered. Then,

mechanisms for the elimination of discrimination and for the rehabilitation of prostitutes have to be implemented. Clearly, these are long-term endeavours.

With regards to obscenity, Canada's criminal law fully respects the spirit of the U.N. texts ... with all the difficulties that this entails in interpreting the term.

Whatever terminology is used, whatever goals international policies seek to attain, one of the fundamental problems is and will remain that of the incongruence between international policies and long-term goals and national policies facing day-to-day realities, the political ones not being the least of them. These international statements may well express common objectives; but so long as they can be ratified by states whose national policies contradict their essence (as in the case of prostitution), or so long as they do not precisely define what they purport to condemn (as in obscenity), they may fall into disrepute and remain 'lettre morte'.

NOTES

- League of Nations, <u>Recueil des traités</u>, <u>No.II -- International Agreement</u> for the Suppression of the "White Slave Traffic", Signed at Paris, May 18, 1904.
- 2. League of Nations, Recueil des traités, International Convention for the Suppression of the White Slave Traffic, Signed at Paris, May 4, 1910.
- 3. League of Nations, <u>Recueil des traités</u>, <u>International Convention for the Suppression of the Traffic in Women and Children</u>, Signed at Geneva, September 30, 1921.
- 4. League of Nations, <u>Recueil des traités</u>, <u>International Convention for the Suppression of the Traffic in Women of Full Age</u>, <u>Signed at Geneva</u>, <u>October 11</u>, 1933.
- 5. League of Nations, Report of the Special Body of Experts on Traffic in Women and Children. Geneva, 1927, Part I, p.:47.
- 6. League of Nations, <u>Commission of Enquiry into Traffic in Women and Children in the East. Geneva</u>, 1932, p.:96
- 7. United Nations, Treaty Series, Protocol to amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933. Signed at Lake Success, New York, on 12 November 1947.
- 8. United Nations, <u>Treaty Series</u>, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (with Final Protocol). Opened for Signature at Lake Success, New York, on 21 March 1950.
- 9. United Nations, Study on Traffic in Persons and Prostitution. Department of Economic and Social Affairs, New York, 1959, p.:12.
- 10.Economic and Social Council, Resolution 1982/20, Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This resolution "Requests the Secretary-General to appoint a special rapporteur who, (...) will make a synthesis of the surveys and studies on the traffic in persons and the exploitation of the prostitution of others that have been or are being carried out(...) and will present that synthesis and propose appropriate measures to prevent and suppress those practices that are contrary to the fundamental rights of human beings".

This report will be submitted by Mr. Jean Fernand-Laurent on 17 March

Economic and Social Council, Activities for the Advancement of Women: Equality, Development and Peace. Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others. E/1983/7, 17 March 1983.

- 11.United Nations, Resolution 217 (III). International Bill of Human Rights. A Declaration of Human Rights. in Djonovich, D.J., <u>United Nations Resolutions</u>. Series I- Resolutions Adopted by the <u>General Assembly</u>. Volume II 1948-1949. New York, Oceana, 1973: 135-143.
- 12.United Nations, Resolution 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, and Optional Protocol to the International Covenant on Civil and Political Rights. in Djonovich, D.J., op.cit., p.: 165-176.
- 13.United Nations, Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women. Adopted by the General Assembly December 18 1979.
- 14.League of Nations, <u>Recueil des traités</u>, <u>International Convention on the Suppression of Slavery. 25 September 1926.</u>
- 15. Castaneda, J., <u>Legal Effects of United Nations Resolutions</u>. New York: Columbia University Press, 1969.
- 16. Commission on Human Rights, Report of the Eighteenth Session(19 March 14 April 1962). Economic and Social Council, United Nations, Document E/3616, rev. 1, para. 105.
- 17. Fernand-Laurent, J., op.cit., p.:7-8
- 18.United Nations, <u>Study on Traffic in Persons and Prostitution</u>. <u>op.cit.</u>, p.: 8-9.
- 19.League of Nations, Recueil des traités, Convention for the Suppression of the Circulation of, and Traffic in Obscene Publications. Concluded at Geneva, 12 September 1923.
- 20.United Nations. Protocol to amend the Convention for the Suppression of the Circulation and Traffic in Obscene Publications. Signed at Lake Success, New York, 12 November 1947.
- 21.League of Nations, <u>Recueil des traités</u>, <u>International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications</u>. Geneva, 12 September 1923.
- 22.United Nations, <u>Protocol</u> to amend the International Convention for the <u>Suppression of the Circulation of and Traffic in Obscene Publications</u>. Signed at Lake Success, New York, 12 November, 1947.
- 23.Universal Postal Union, Universal Postal Convention, in <u>Documents of the 1974 Lausanne Congress</u>, volume III, Berne, 1975: 107-223.
- 24. International Telecommunications Union, <u>International Telecommunications</u> Convention.

No. 1342. CONVENTION¹ FOR THE SUPPRESSION OF THE TRAFFIC IN PERSONS AND OF THE EXPLOITATION OF THE PROSTITUTION OF OTHERS. OPENED FOR SIGNATURE AT LAKE SUCCESS, NEW YORK, ON 21 MARCH 1950

PREAMBLE

Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community,

Whereas, with respect to the suppression of the traffic in women and children, the following international instruments are in force:

- 1. International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, as amended by the Protocol approved by the General Assembly of the United Nations on 3 December 1948,²
- 2. International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, as amended by the above-mentioned Protocol,³
- 3. International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947,⁴
- 4. International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age, as amended by the aforesaid Protocol,⁵

Whereas the League of Nations in 1937 prepared a draft Convention⁶ extending the scope of the above-mentioned instruments, and

The following States deposited with the Secretary-General of the United Nations their instruments of ratification or accession on the dates indicated:

Accession.—Israel 28 December 1950 Ratification.—Yugoslavia 25 April 1951

¹ Came into force on 25 July 1951, the ninetieth day following the date of deposit of the second instrument of ratification or accession, in accordance with article 24.

² United Nations, Treaty Series, Vol. 92, p. 19.

³ United Nations, Treaty Series, Vol. 98, p. 109.

⁴ United Nations, Treaty Series, Vol. 53, p. 39, Vol. 65, p. 333; Vol. 76, p. 281, and Vol. 77, p. 364.

⁶ United Nations, Treaty Series, Vol. 53, p. 49; Vol. 65, p. 334; Vol. 76, p. 281, and Vol. 77, p. 365.

^{*} League of Nations, document C.331.M.223.1937.IV.

Whereas developments since 1937 make feasible the conclusion of a convention consolidating the above-mentioned instruments and embodying the substance of the 1937 draft Convention as well as desirable alterations therein;

Now therefore

The Contracting Parties

Hereby agree as hereinafter provided:

Article 1

The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

- 1. Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- 2. Exploits the prostitution of another person, even with the consent of that person.

Article 2

The Parties to the present Convention further agree to punish any person who:

- 1. Keeps or manages, or knowingly finances or takes part in the financing of a brothel;
- 2. Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

Article 3

To the extent permitted by domestic law, attempts to commit any of the offences referred to in articles 1 and 2, and acts preparatory to the commission thereof, shall also be punished.

Article 4

To the extent permitted by domestic law, intentional participation in the acts referred to in articles 1 and 2 above shall also be punishable.

To the extent permitted by domestic law, acts of participation shall be treated as separate offences whenever this is necessary to prevent impunity.

Article 5

In cases where injured persons are entitled under domestic law to be parties to proceedings in respect of any of the offences referred to in the present Convention, aliens shall be so entitled upon the same terms as nationals.

Each Party to the present Convention agrees to take all the necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.

Article 7

Previous convictions pronounced in foreign States for offences referred to in the present Convention shall, to the extent permitted by domestic law, be taken into account for the purpose of:

- 1. Establishing recidivism;
- 2. Disqualifying the offender from the exercise of civil rights.

Article 8

The offences referred to in articles 1 and 2 of the present Convention shall be regarded as extraditable offences in any extradition treaty which has been or may hereafter be concluded between any of the Parties to this Convention.

The Parties to the present Convention which do not make extradition conditional on the existence of a treaty shall henceforward recognize the offences referred to in articles 1 and 2 of the present Convention as cases for extradition between themselves.

Extradition shall be granted in accordance with the law of the State to which the request is made.

Article 9

In States where the extradition of nationals is not permitted by law, nationals who have returned to their own State after the commission abroad of any of the offences referred to in articles 1 and 2 of the present Convention shall be prosecuted in and punished by the courts of their own State.

This provision shall not apply if, in a similar case between the Parties to the present Convention, the extradition of an alien cannot be granted.

Article 10

The provisions of article 9 shall not apply when the person charged with the offence has been tried in a foreign State and, if convicted, has served his sentence or had it remitted or reduced in conformity with the laws of that foreign State.

Nothing in the present Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law.

Article 12

The present Convention does not affect the principle that the offences to which it refers shall in each State be defined, prosecuted and punished in conformity with its domestic law.

Article 13

The Parties to the present Convention shall be bound to execute letters of request relating to offences referred to in the Convention in accordance with their domestic law and practice.

The transmission of letters of request shall be effected:

- 1. By direct communication between the judicial authorities; or
- 2. By direct communication between the Ministers of Justice of the two States, or by direct communication from another competent authority of the State making the request to the Minister of Justice of the State to which the request is made; or
- 3. Through the diplomatic or consular representative of the State making the request in the State to which the request is made; this representative shall send the letters of request direct to the competent judicial authority or to the authority indicated by the Government of the State to which the request is made, and shall receive direct from such authority the papers constituting the execution of the letters of request.

In cases 1 and 3 a copy of the letters of request shall always be sent to the

superior authority of the State to which application is made.

Unless otherwise agreed, the letters of request shall be drawn up in the language of the authority making the request, provided always that the State to which the request is made may require a translation in its own language, certified correct by the authority making the request.

Each Party to the present Convention shall notify to each of the other Parties to the Convention the method or methods of transmission mentioned above which it will recognize for the letters of request of the latter State.

Until such notification is made by a State, its existing procedure in regard to letters of request shall remain in force.

Execution of letters of request shall not give rise to a claim for reimbursement of charges or expenses of any nature whatever other than expenses of experts.

Nothing in the present article shall be construed as an undertaking on the part of the Parties to the present Convention to adopt in criminal matters any form or methods of proof contrary to their own domestic laws.

Article 14

Each Party to the present Convention shall establish or maintain a service charged with the co-ordination and centralization of the results of the investigation of offences referred to in the present Convention.

Such services should compile all information calculated to facilitate the prevention and punishment of the offences referred to in the present Convention and should be in close contact with the corresponding services in other States.

Article 15

To the extent permitted by domestic law and to the extent to which the authorities responsible for the services referred to in article 14 may judge desirable, they shall furnish to the authorities responsible for the corresponding services in other States the following information:

- 1. Particulars of any offence referred to in the present Convention or any attempt to commit such offence;
- 2. Particulars of any search for and any prosecution, arrest, conviction, refusal of admission or expulsion of persons guilty of any of the offences referred to in the present Convention, the movements of such persons and any other useful information with regard to them.

The information so furnished shall include descriptions of the offenders, their fingerprints, photographs, methods of operation, police records and records of conviction.

Article 16

The Parties to the present Convention agree to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention.

The Parties to the present Convention undertake, in connexion with immigration and emigration, to adopt or maintain such measures as are required in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution.

In particular they undertake:

- 1. To make such regulations as are necessary for the protection of immigrants or emigrants, and in particular, women and children, both at the place of arrival and departure and while en route;
- 2. To arrange for appropriate publicity warning the public of the dangers of the aforesaid traffic;
- 3. To take appropriate measures to ensure supervision of railway stations, airports, seaports and *en route*, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution;
- 4. To take appropriate measures in order that the appropriate authorities be informed of the arrival of persons who appear, *prima facie*, to be the principals and accomplices in or victims of such traffic.

Article 18

The Parties to the present Convention undertake, in accordance with the conditions laid down by domestic law, to have declarations taken from aliens who are prostitutes, in order to establish their identity and civil status and to discover who has caused them to leave their State. The information obtained shall be communicated to the authorities of the State of origin of the said persons with a view to their eventual repatriation.

Article 19

The Parties to the present Convention undertake, in accordance with the conditions laid down by domestic law and without prejudice to prosecution or other action for violations thereunder and so far as possible:

- 1. Pending the completion of arrangements for the repatriation of destitute victims of international traffic in persons for the purpose of prostitution, to make suitable provisions for their temporary care and maintenance;
- 2. To repatriate persons referred to in article 18 who desire to be repatriated or who may be claimed by persons exercising authority over them or whose

expulsion is ordered in conformity with the law. Repatriation shall take place only after agreement is reached with the State of destination as to identity and nationality as well as to the place and date of arrival at frontiers. Each Party to the present Convention shall facilitate the passage of such persons through its territory.

Where the persons referred to in the preceding paragraph cannot themselves repay the cost of repatriation and have neither spouse, relatives nor guardian to pay for them, the cost of repatriation as far as the nearest frontier or port of embarkation or airport in the direction of the State of origin shall be borne by the State where they are in residence, and the cost of the remainder of the journey shall be borne by the State of origin.

Article 20

The Parties to the present Convention shall, if they have not already done so, take the necessary measures for the supervision of employment agencies in order to prevent persons seeking employment, in particular women and children, from being exposed to the danger of prostitution.

Article 21

The Parties to the present Convention shall communicate to the Secretary-General of the United Nations such laws and regulations as have already been promulgated in their States, and thereafter annually such laws and regulations as may be promulgated, relating to the subjects of the present Convention, as well as all measures taken by them concerning the application of the Convention. The information received shall be published periodically by the Secretary-General and sent to all Members of the United Nations and to non-member States to which the present Convention is officially communicated in accordance with article 23.

Article 22

If any dispute shall arise between the Parties to the present Convention relating to its interpretation or application and if such dispute cannot be settled by other means, the dispute shall, at the request of any one of the Parties to the dispute, be referred to the International Court of Justice.

Article 23

The present Convention shall be open for signature on behalf of any Member of the United Nations and also on behalf of any other State to which an invitation has been addressed by the Economic and Social Council.

The present Convention shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

The States mentioned in the first paragraph which have not signed the Convention may accede to it.

Accession shall be effected by deposit of an instrument of accession with

the Secretary-General of the United Nations.

For the purpose of the present Convention the word "State" shall include all the colonies and Trust Territories of a State signatory or acceding to the Convention and all territories for which such State is internationally responsible.

Article 24

The present Convention shall come into force on the ninetieth day following the date of deposit of the second instrument of ratification or accession.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification or accession, the Convention shall enter into force ninety days after the deposit by such State of its instrument of ratification or accession.

Article 25

After the expiration of five years from the entry into force of the present Convention, any Party to the Convention may denounce it by a written notification addressed to the Secretary-General of the United Nations.

Such denunciation shall take effect for the Party making it one year from the date upon which it is received by the Secretary-General of the United Nations.

Article 26

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 23:

- (a) Of signatures, ratifications and accessions received in accordance with article 23;
- (b) Of the date on which the present Convention will come into force in accordance with article 24;
 - (c) Of denunciations received in accordance with article 25.

Article 27

Each Party to the present Convention undertakes to adopt, in accordance with its Constitution, the legislative or other measures necessary to ensure the application of the Convention.

The provisions of the present Convention shall supersede in the relations between the Parties thereto the provisions of the international instruments referred to in sub-paragraphs 1, 2, 3 and 4 of the second paragraph of the Preamble, each of which shall be deemed to be terminated when all the Parties thereto shall have become Parties to the present Convention.

In faith whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention, opened for signature at Lake Success, New York, on the twenty-first day of March, one thousand nine hundred and fifty, a certified true copy of which shall be transmitted by the Secretary-General to all the Members of the United Nations and to the non-member States referred to in article 23.

accede to it at any time. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

- 3. This Agreement shall enter into force on the thirtieth day following the date of deposit of the fifth instrument of ratification.
- 4. For each State depositing its instrument of ratification or accession after the entry into force of this Agreement, it shall enter into force on the thirtieth day following the date of deposit of any such instrument.
- 5. The Secretary-General shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession to this Agreement, the date of its entry into force and other notices.

Any State Party to this Agreement may give notice of its withdrawal from the Agreement one year after its entry into force by written notification to the Secretary-General of the United Nations. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article 21

The original of this Agreement, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all signatory and acceding States.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, ADOPTED BY THE GENERAL ASSEMBLY ON 18 DECEMBER 1979

The States Parties to the present Convention,

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Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights' affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States parties to the International Covenants on Human Rights⁸ have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the

The Agreement was opened for signature on 18 December 1979.
 General Assembly resolution 217 A (III).

⁸ General Assembly resolution 2200 A (XXI), annex

prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing or responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women, and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

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- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
 - (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

- 1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
- 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women:
- (b) To ensure that family education includes a proper undertstanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all apropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

- 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They-shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
- 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishment of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging co-education and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaption of teaching methods;
 - (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
 - (g) The same opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

- 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
 - (a) The right to work as an inalienable right of all human beings;

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- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
- 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
- (a) To prohibit, subject to the imposition of sanctions, dismissal on the ground of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
- 3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

- 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

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- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

- 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
- 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they

participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
 - (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
 - (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

- 1. States Parties shall accord to women equality with men before the law.
- 2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
- 3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void
- 4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

- 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent:
 - (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

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(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

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(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of 23 experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

- 1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:
 - (a) Within one year after the entry into force for the State concerned;
 - (b) Thereafter at least every four years and further whenever the Committee so requests,

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2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19

- 1. The Committee shall adopt its own rules of procedure.
- 2. The Committee shall elect its officers for a term of two years.

Article 20_

- 1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.
- 2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21

- 1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
- 2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

- 1. The present Convention shall be open for signature by-all States.
- 2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
- 3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
- 4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

- 1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
- 2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

- 1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession
- 2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

- 1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
- 2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
- 3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

- 1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
- 2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
- 3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

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The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations, IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

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3. INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES. ADOPTED BY THE GENERAL ASSEMBLY ON 17 DECEMBER 1979

The States Parties to this Convention,

Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and cooperation among States,

Recognizing in particular, that everyone has the right to life, liberty and security of person, as set out in the Universal Declaration of Human Rights' and the International Covenant on Civil and Political Rights,10

Reaffirming the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 11 as well as in other relevant resolutions of the General Assembly,

Considering that the taking of hostages is an offence of grave concern to the international community and that, in accordance with the provisions of this Convention, any person committing an act of hostage taking shall be either prosecuted or extradited,

Being convinced that it is urgently necessary to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism,

Have agreed as follows:

- 1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.
 - 2. Any person who:
 - (a) Attempts to commit an act of hostage-taking, or
- (b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

Article 2

Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

Article 3

1. The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure.

General Assembly resolution 217 A (III).
 General Assembly resolution 2200 A (XXI), annex.
 General Assembly resolution 2625 (XXV), annex.



- 1. Expresses its satisfaction with the activities thus far accomplished in the programme of work of the International Research and Training Institute for the Advancement of Women;
- 2. Takes note of the decisions and recommendations made by the Board of Trustees of the Institute at its third session; 60/
- 3. Notes with satisfaction the completion of the first phase of the programme on statistics and indicators on the situation of women and the launching of training and fellowship programmes of the Institute;
- 4. <u>Emphasizes</u> that the work programme of the Institute for the biennium 1984-1985 should continue to focus on research, training and information that would lead to the integration of women in mainstream developmental activities;
- 5. Reiterates the need for support and close co-operation between the Institute and the regional commissions, specialized agencies and other United Nations bodies;
- 6. <u>Calls upon</u> all Member States to contribute to the United Nations Trust Fund for the International Research and Training Institute for the Advancement of Women and to ensure regular and effective financing for its progress and development.

14th plenary meeting 26 May 1983

Resolution 1983/30. Suppression of the traffic in persons and of the exploitation of the prostitution of others

The Economic and Social Council,

Recalling that the enslavement of women and children subjected to prostitution is incompatible with the dignity and fundamental rights of the human person,

Recalling its resolution 1982/20 of 4 May 1982,

Having taken note of the report prepared by the Special Rapporteur in pursuance of that resolution, 61/

1. Again invites Member States to sign, ratify and implement the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; 62/

^{60/} Ibid., sect. I.

^{61/} E/1983/7 and Corr.1 and 2.

^{62/} General Assembly resolution 317 (IV), annex.

- - 2. Also invites Nember States to sign, ratify and implement the International Convention for the Suppression of the Ulation of and Traffic in Obscene Publications, concluded at Geneva on 12 September 1923, as amended by the Protocol signed at Lake Success, New York, on 12 November 1947; 63/
 - 3. Recommends that Member States should take account of the report of the Special Rapporteur and draw up, subject to their constitutions and legislation and in consultation with the parties concerned, policies aimed, to the extent possible, at:
 - (a) Preventing prostitution by moral education and civics training, in and out of school;
 - (b) Increasing the number of women among the State's personnel having direct contact with the populations concerned;
 - (c) Eliminating discrimination that ostracizes prostitutes and makes their reabsorption into society more difficult;
 - (d) Curbing the pornography industry and the trade in pornography and penalizing them very severely when minors are involved;
 - (e) Punishing all forms of procuring in such a way as to deter it, particularly when it exploits minors;
 - (f) Facilitating occupational training for and the reabsorption into society of persons rescued from prostitution;
 - 4. Further invites Member States to co-operate closely with one another in the search for missing persons and in the identification of international networks of procurers and, if they are members of the International Criminal Police of procurers and, if they are members of the International Criminal Police Organization, to co-operate with that organization, requesting it to make the suppression of the traffic in persons one of its priorities;
 - 5. <u>Invites</u> the regional commissions to help Member States and United Nation bodies wishing to organize regional expert meetings, seminars or symposia on the traffic in persons;
 - 6. Suggests to the Secretary-General that he designate as a focal point the Centre for Human Rights, specifically the secretariat of the Working Group on Slavery, in close co-operation with the Centre for Social Development and Slavery, in close co-operation with the Centre for Social Development and Slavery, in close co-operation with the Centre for Social Development and Social Affair
 - 7. Requests the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider the possibility of inviting the Commission of the Status of Women to designate a representative to participate in all sessions the Working Group on Slavery, in accordance with Economic and Social Council resolution 48 (IV) of 29 March 1947;

^{63/} United Nations, Treaty Series, vol. 46, No. 710, p. 201.

8. Requests the Centre for Human Rights to prepare, in liaison with the United Nations agencies and organs concerned and with the competent non-governmental organizations, two complementary studies; one on the sale of children and the other on the legal and social problems of sexual minorities, children and prostitution, and to submit those studies as soon as possible to the Sub-Commission on Prevention of Discrimination and Protection of Minorities;

4.

- 9. Encourages the Centre for Social Development and Humanitarian Affairs of the Department of International Economic and Social Affairs to utilize the available resources of all its branches with a view to undertaking interdisciplinary studies, and to co-operate with the Division of Narcotic Drugs;
- 10. <u>Invites</u> all the organs, organizations and agencies of the United Nations system concerned, particularly the United Nations Children's Fund, the Office of the United Nations High Commissioner for Refugees, the International Labour Organisation and the World Health Organization, to bring the traffic in persons to the notice of their representatives and experts and to transmit their observations and their studies to the focal point designated by the Secretary-General;
- 11. Encourages the United Nations Educational, Scientific and Cultural Organization to draw up, with member States, programmes for use in schools and in the media concerning the image of women in society;
- 12. Invites the World Tourism Organization to place the question of sex-oriented tourism on its agenda;
- 13. Requests the Secretary-General to take the necessary steps to have the report prepared by the Special Rapporteur in pursuance of Council resolution 1982/20 reproduced as a United Nations publication so that it may be widely disseminated;
- 14. Also requests the Secretary-General to report to the Economic and Social Council, at its first regular session of 1985, on the steps taken to implement the present resolution;
- 15. Decides that the activities recommended in the present resolution will be carried out within the limits of the resources provided for by the Secretary-General in the proposed programme budget for the biennium 1984-1985.

14th plenary meeting 26 May 1983







Economic and Social Council

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First regular session of 1983
Item 12 of the provisional agenda*

ACTIVITIES FOR THE ADVANCEMENT OF WOMEN: EQUALITY, DEVELOPMENT AND PEACE

Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others

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several of these non-governmental organizations: the Congress, in Nice, of the International Abolitionist Federation (September 1981); the Congress, in Paris, of the International Society of Child Abuse and Neglect (September 1982); the general assembly, in London, of the Anti-Slavery Society (December 1982). On the first of these occasions and on other occasions, he met individuals who were prostitutes or had recently escaped from prostitution.

- 13. It was not an explicit part of the Special Rapporteur's mandate to seek information from Governments. In any case, he would not have had time to do so. Nevertheless, he consulted existing public documentation on the policies of certain Governments. He also consulted a large bibliography, the essential part of which is reproduced in annex VI.
- 14. The Special Rapporteur wishes to express deep gratitude to all those with whom he talked or corresponded.
- 15. Before embarking on the study, it remains for him to outline the plan adopted. Chapter I attempts to describe in a clear and orderly manner the world of prostitution and the slavery to which women and children are subjected in it. It does so in a somewhat didactic manner so that the report can serve as an introduction to officials who have not yet had an opportunity to find out about the situation. This chapter will be supplemented by an indication of the principal known or suspected routes of traffic. Chapters II and III will contain suggestions to Member States concerning national policy, and proposals for the United Nations and Member States concerning international co-operation. The Council may find the elements of a draft resolution in the second and third parts. The annexes contain the basic documents which may serve as references for future work as well.

Chapter I

A UNIVERSAL AND INTERDISCIPLINARY QUESTION

- 16. Contrary to an opinion that is too widespread, prostitution is not the oldest profession. (It was and still is unknown in many so-called "primitive" societies.) But it is true that it is found today to varying degrees in all organized States, in all cultures and in all parts of the world, especially where the population is very dense and where money changes hands frequently.
- 17. In an analysis of the problem, it can be approached from several angles and this, as we shall see, is why it interests organizations with very different aims. One can approach it from the angle of ethnology, sociology or cultural history, for example; or again, from the point of view of political economy, one can see the world of prostitution as a closed economic system; or, from the point of view of criminology, as a branch of the criminal world because of the procuring involved. Prostitution can also be judged by the standards of public health, religion or morality. We ourselves, without overlooking any of these approaches, shall take the human rights approach, as does the Economic and Social Council; and from that point of view we, like the Commission on Human Rights, consider prostitution to be a form of slavery.

A. A three-way trade

- 18. Like slavery in the usual sense, prostitution has an economic aspect. While being a cultural phenomenon rooted in the masculine and feminine images given currency by society, it is a market and indeed a very lucrative one. The merchandise involved is men's pleasure, or their image of pleasure. This merchandise is unfortunately supplied by physical intimacy with women or children. Thus, the alienation of the person is here more far-reaching than in slavery in its usual sense, where what is alienated is working strength, not intimacy.
- 19. The market is created by demand, which is met by supply. The demand comes from the client, who could also be called the "prostitutor". The supply is provided by the prostitute. This is the simplest but also the rarest example. In most cases (8 or 9 times out of 10, according to observers, at least in Europe), a third person comes into the picture, perhaps the most important; this is the organizer and exploiter of the market in other words, the procurer in his various guises: go-between or recruiter, pimp, owner of a house of prostitution, "massage parlour" or bar, or provider of a hotel room or studio. The procurer is usually a professional, involved to some extent in the world of crime. When it comes to children, it can be an older child who runs a "racket".
- 20. In the industrialized market-economy States, a concern not to hamper trade allows an overt market for eroticism and pornography to develop alongside the discreet prostitution market. The two complement and reinforce each other. The streets on which the sex shops are located are those where prostitution is heaviest.
- 21. Of the three partners in the three-way relationship client, prostitute and procurer least is known about the first mentioned. Since there are no laws or regulations that either punish or restrict the client, he can remain anonymous. There is so far no literature, to the Rapporteur's knowledge, in which the client has himself divulged his motivations. 9/ The reasons which prompt a bachelor or a married man to become a client have not as yet been analysed. Meanwhile, one can only suppose that his desires and his behaviour stem from the image that society gives him of his virility and from the conception which he has of women's duty being to serve his pleasure. Military service and the media no doubt play a decisive role here. Insufficient preparation for marriage among women, and also among men, might explain certain unsuccessful marriages which lead the husband to seek sexual satisfaction outside the home.
- 22. More is known about the prostitute, because she is monitored by social workers and has often been described in literature. Moreover, in recent times, several former prostitutes have given autobiographical accounts of their prostitution experiences. Today, therefore, we know what brings a woman to the point of becoming a prostitute. Economic hardship is the main reason, but it is not enough; not all poor women become prostitutes; in addition to poverty, there must be a loss of respect for moral strictures, an emotional frustration (rejection of parents or by parents, desertion by a husband or by a lover), and a lack of outside assistance or a refusal to use it when it is available. Statistically, most prostitutes have been raised in broken families; a large number of them have been the victims of rape or incest. They therefore do not count on their families if they want to

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raise children they have had with men who have deserted them (many of them are unmarried mothers - 70 per cent according to the English Collective of Prostitutes - and they are very attached to their children). In the quite rare cases where the prostitute comes from an affluent family, she is motivated by a desire to challenge conventional morality combined with an excessive interest in money and the satisfactions it can provide. Does not, however, this need for money reflect the deeper need to use the external trappings of wealth to overcome the frustration of one whose personality fails to make a mark on those around her? More basically, a woman of any social level can fall into prostitution as she would fall into alcoholism or drug abuse, or as she would commit suicide: through grief, loneliness, boredom or despair. Then again it can happen in the case of addicts that prostitution seems to be the only means of obtaining drugs. 10/ In short, it could be said of most women prostitutes that they have moved from a marginal situation into another even more marginal state.

23. At any rate, even when prostitution seems to have been chosen freely, it is actually the result of coercion. That was the gist of the testimony given to the Congress of Nice on 8 September 1981 by three "collectives" of women prostitutes from two major developed countries:

"As prostitutes, we are well aware that <u>all</u> prostitution is forced prostitution. Whether we are forced to become prostitutes by lack of money or by housing or unemployment problems, or to escape from a family situation of rape or violence (which is often the case with very young prostitutes), or by a procurer, we would not lead the 'life' if we were in a position to leave it." 11/

- 24. The rural exodus in the developing countries figures as a determining cause of prostitution. A survey published in 1978 by the Dakar magazine Famille et Development (see annex VI.14), shows that employment in the cities is essentially male-oriented. Thus, the first victims in the cities are women. In the country, they have a role as producers; in the city their only role will be that of mothers and wives. Often illiterate and without professional qualifications, they have few alternatives: to be unskilled workers in the few factories where the work force is largely female, to work in domestic service, to ply a small trade or to become prostitutes. For a number of years, this last option has been forced on many women as a condition of survival for themselves and their children. In addition, the supply of prostitutes has grown to meet the demand of large-scale tourism (see para. 39).
- 25. Emigration, which is often an extension of the rural exodus, produces comparable effects. Women immigrants are, as pointed out in the paper presented at Nice by three "collectives" (see para. 23), the most vulnerable to exploitation:

"Women who have been raped, beaten, forced to work for a pimp (as a prostitute who works for a procurer or a domestic worker in a family), or for illegal wages on the black market, are too afraid of being deported and dare not complain to the police." $\underline{12}$ /

Further comments will be made in paragraph 80 on the effects of worker migrations on prostitution.

- 26. Wherever foreign troops are present in large numbers, one can observe both in the country concerned and in the neighbouring countries where the soldiers spend their leave the appearance of a prostitution market or expansion of the existing market. Habits are established among the female population which, after the troops or bases are withdrawn, will be exploited by the tourist networks which take over. One organization of Asian women considers this yet another reason for opposing military alliances and use of the smallest countries in preparations for a new world war.
- 27. Occasional prostitution, the so-called "end-of-the-month" type, becomes permanent prostitution once the woman falls into the clutches of a procurer. The procurer is a character more often depicted in literature or in films than met with by the social workers. On the other hand, he is very well known to the police, which sometimes (too often!) uses him as an informer. Despise for women, congenital sloth and a total lack of morals are the characteristics that predispose a man to become a procurer. As a recruiter, he "sells" women to a house of prostitution or to a pimp. The pimps keep virtually all the women's daily earnings. All are involved in the world of crime. The considerable sums earned from procuring actually constitute, according to the police, the "working capital" of organized crime. These funds are sufficient to corrupt, when they are corruptible, those in political circles, the police and other State officials.
- 28. The naiveté of young people facilitates the task of the recruiters and pimps, who have several tricks for subjugating their victims, without always having to resort to force. The procurer, who has hardly anything else to do is adept at detecting the weaknesses of his future victims. Among the most frequently used tricks are seduction and a fraudulent promise of marriage or of lucrative employment, followed by the demand for "temporary" prostitution to repay a fictitious debt; at other times, the lure is a contract to join an artistic tour abroad, a tour which ends in a house of prostitution or a restaurant or place of entertainment that is also used for prostitution; at other times it is the offer of travel abroad as au pairs or students in language-training centres. When force is used, it involves drugs which facilitate kidnapping and sequestration, beating, torture, blackmail involving children and threats of mutilation or murder. Such threats are all the more to be feared since it is known that they are sometimes carried out.
- 29. Other tricks and other constraints are practised on children. There is no doubt that in the slum belts of certain large cities, children sometimes have no other choice in order to survive but to pick through garbage, beg, steal or become prostitutes. But adults paedophiles or procurers often take the initiative by offering money or gifts. In depressed rural areas, where helpless peasant families are heavily in debt to a usurer, the children are sometimes bought or rented by a procurer from their parents, who may or may not be aware of their ultimate fate. If the child is an orphan, an abandoned child, a runaway or temporarily separated from his parents by some catastrophe, he is especially vulnerable and can simply be kidnapped. Paedophile tourists may be involved (see para. 40).

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- 30. In some industrialized countries, child prostitution has recently been organized to benefit the pornography industry, which produces photo albums, films and video cassettes. Children are photographed or filmed in indecent positions, and these pictures are sold for high prices through a clandestine network of persons interested in such things. This trade may be national or international.
- 31. Procuring does not stop at the activities of recruiter, go-between or pimp. Many laws consider as a procurer and prosecute as such any person who knowingly derives profit from the prostitution of others. This applies to a landlord or tenant who makes premises available, at rates above the average rent, to a prostitute for the pursuit of her activities: these are the offences of procuring through the provision of hotel or other premises. The owner or manager of a bar where waitresses are encouraged to act as prostitutes is also a procurer, although he is rarely prosecuted. An organizer of package tours ("sex charters") where the services of a prostitute are included in the package is also a procurer, although so far there have been no prosecutions. In this same category of procurers, we should include the social clubs or the so-called "marriage" bureaux, when such enterprises derive a profit from rendezvous where payment is made for sexual favours (some international marriages of convenience are concluded simply for the sake of prostitution). Should the publisher of a book or newspaper that encourages such practices also be considered a procurer? The human imagination is limitless where there is a profit to be made.
- 32. Certain intelligence services and capitalist firms act as procurers when, in order to corrupt or compromise a statesman or businessman, they arrange for him to meet women, styled as hostesses or secretaries, who are trained in this particular form of "high-class" prostitution.
- 33. Procurers usually conduct their activities with impunity. Perhaps because the police or the investigating official are not sufficiently zealous (through negligence, fear or corruption), or because it is sometimes difficult to obtain proof of such offences (in court the victim, fearing reprisals, may withdraw charges made to the police and the investigating official), or because the procurer is protected as an informer, or else because the offender escapes prosecution by crossing the border, the fact remains that repression is ineffectual. In the Western European State which considers itself to be the strictest, repression affects about 1 procurer out of 10: the deterrent effect is very inadequate.

B. A form of slavery

- 34. A review of the various collective (remote) and individual (immediate) causes of prostitution poverty, emotional deprivation, trickery and coercion on the part of procurers makes it unnecessary to invoke any kind of mental weakness or supposed vicious inclination to explain why women fall into prostitution.
- 35. Once embarked on that course, they enter a state of servitude. Denied any independence, forced, in order to engage in their new activity, to abide by the rules imposed by the "old hands", exposed to the pressures, untempered by any competing influences, of the morality and law of the "underworld", which are

neither the morality nor the law of lawful society, subjected by the procurer to a very effective discipline which metes out punishment with an (infrequent) admixture of reward, they immediately find themselves in a marginal situation and undergo a psychological conditioning such as may be experienced by someone living in community within a sect. When able to judge objectively, those women who have been able to escape from this environment realize that there they were deprived not only of their name, but of their very identity. A woman may also be sold by one procurer to another, as were slaves in the past and as is merchandise today. relationship between prostitute and procurer, known to prostitutes in the West as "my husband" or "my man", is ambivalent: it is possible that the woman may find in the man, in spite of his brutality, both a husband and the father she never had in childhood. This does not alter the fact that the relationship is one of dominator and dominated, exploiter and exploited, master and slave. The restricted life of a house of prostitution, even when christened "Turkish bath", "sauna", "massage parlour" or "Eros Centre", is even harsher than that of the street corner. The Director-General of UNESCO, through his spokesperson at the Mexico City Conference of the International Women's Year, drew attention to the tortures sometimes inflicted on inmates. While it is true that not all are tortured, all are nevertheless subjected to the most degrading and destructive form of slavery.

36. It is easy to slide into prostitution. It is very difficult to escape from it. To free oneself from a procurer, it is usually necessary to pay him a substantial "fine", sometimes equivalent to a whole year's earnings from prostitution. If one has the courage to inform on him to the police, something which is forbidden by the law of the underworld, there is a risk of terrible reprisals: mutilation or even death. Those few prostitutes who are not controlled by a procurer do not find it much easier to break free of their environment, so profoundly have they been marked by it and so strongly do they feel themselves rejected (as in fact they often are) by the "normal" society to which they wish to return. It would not be an exaggeration to say that, if she is to be successfully reintegrated in that society, a prostitute requires heroic courage.

C. International networks

37. The International Criminal Police Organization (ICPO or INTERPOL), an intergovernmental organization linked through a special arrangement with the United Nations Economic and Social Council and composed of the central criminal police bureaux of 134 States, prepared for its General Assembly of October 1975 in Buenos Aires a third report on the traffic in women. That report was published by Kathleen Barry as an annex to her book entitled Female Sexual Slavery (see annex VI.2). Parts of it were quoted by Mr. Benjamin Whitaker in his report (E/CN.4/Sub.2/1982/20; see annex III). On the basis of information received from the police in 69 States, the report identifies a number of international networks involved in this traffic: one flowing from Latin America to Puerto Rico and beyond, to southern Europe and the Middle East; one flowing from South-East Asia to the Middle East and central and northern Europe; a regional European market, in part supplied by Latin America and exporting French women to Luxembourg and the Federal Republic of Germany; one supplying some of the richer countries of West Africa from Europe; and a regional market in the Arab countries. The author of the

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report did not have access to information from East Africa and does not mention the existence, noted by travellers through that region, of slave markets supplying the Middle East. More recently, the migration of African refugees to Europe has involved women who have been found working as prostitutes only a few months later. Family groups among migrant workers have also on occasion served as a cover for traffic networks. According to this incomplete information, few regions and few countries (with the possible exception of those with highly planned economies) are free of the international traffic in women, and that traffic is far from being confined to a flow from South (less developed) to North (more developed): it would be more accurate to say that the movement involves the traffic of poor women towards rich men in all directions. Through these well-disguised networks, not only adult women but even under-age girls are moved from one country to another.

- In a very useful way, the replies to the annual questionnaire prepared by the Centre for Human Rights, although supplied by only a small minority of States, provide specific supplementary information concerning certain types of international traffic. For example, replies to question 10 were given, for the period 1979-1981, by three countries only: Spain, France, and Singapore. These replies have been summarized in a report on slavery (see annex VI.25), provided by the Centre for Human Rights to the Working Group on slavery for its eighth session in August 1982. They show that the traffic is often carried on under cover of what purport to be marriage bureaux or advertisements for jobs in touring stage shows. They give evidence of procuring networks supplying Geneva from Paris; Switzerland and the Federal Republic of Germany from Bangkok; Singapore from Malaysia and the Philippines; and Spain from France; Cape Verde, South America and the Philippines (109 young Philippine women aged between 16 and 28). Undoubtedly, if equally detailed replies were available from the other States, we would have a very clear picture of the methods and routes used in the traffic in persons. In particular, we would be able to verify and research in more detail the press reports cited by Mr. Whitaker (E/CN.4/Sub.2/1982/20, para. 17), indicating that South American prostitutes are shipped from Argentina to Melbourne, young Hawaiian and Californian women to Japan and Swedish women from Singapore to the Far East.
- 39. More conspicuous, and therefore easier to trace, is the other type of traffic which, instead of transporting the prostitute, temporarily transplants the client. This is the channel of the package tours ("sex tours"), in which the services of a prostitute are included in the price the tourist pays for his ticket. This specialized kind of tourism is grafted onto an existing prostitution market and develops it. Several women's associations and the Churches have denounced this traffic, which is a flourishing movement from the developed countries of America, Europe and Asia towards the countries popular with tourists in Asia, Africa and the Caribbean. In September 1980, in Manila, an international workshop on tourism, meeting with the dual sponsorship of the Christian Conference of Asia and the Confederation of Asian Episcopal Conferences (the report is cited in annex VI.15), adopted eight recommendations relating to prostitution. 13/ In July 1981, an international congress of theologians on "The Community of Men and Women in the Church", meeting in Sheffield (United Kingdom) under the auspices of the World Council of Churches, denounced the phenomenon of sex tours in an "open letter to Christians". In Stockholm, in November 1981, the World Council of Churches organized an international conference on the theme "The Church and Tourism", which

heard evidence from all regions of the world and put forward a moral code for tourists (for the report see annex VI.10). Alongside this activity by the Churches, joint action is being taken by the Asian Women's Association 14/ in the Republic of Korea, Japan and the Philippines: with the assistance of trade union organizations, demonstrations have been mounted in airports to coincide with the departure or arrival of "sex tours"; and a Third World Movement against the Exploitation of Women 15/ has been created among the ASEAN countries. In addition, the Asian Confederation of Women's Organisations 16/ discussed prostitution at its July 1982 meeting and took cognizance of a document submitted by the Philippines containing recommendations which were studied at the government level at the meeting of the Programme for Women of ANSEA held in Bangkok in January 1983. All these activities have led to a perceptible reduction in organized sex tourism in that region; but will that reduction be lasting? And what of the situation in other regions of the world, such as the Caribbean, where local resistance has not yet become organized? In any event, it is advisable to view this issue in the general context of the cultural impact of tourism. That was the approach taken by the group of experts which met in Vienna in September 1982 under the auspices of the Advancement of Women Branch, to discuss the issue "Women and the International Development Strategy". That group denounced the destructive effects on the local community and on the identity of women produced by the exploitation of prostitution for tourist purposes. In the view of the Special Rapporteur, such tourism is quite plainly the worst possible image of development which the industrialized countries could project. Together with erotic films, publications and advertising, it may, in the less developed countries where it is prevalent, provoke hostile reactions to development itself and prompt a return to discriminatory moral strictures which would be an obstacle to the much-needed emancipation of women.

40. The encouragement which the prostitution of young children receives from Western tourism has been highlighted by Mr. Tim Bond, a researcher with the "Terre des Hommes" association of Lausanne. In 1980 he carried out three surveys in two countries of South-East Asia, extending their scope to Europe, where he found on sale to the public publications providing information to paedophiles concerning the opportunities available to them among young boys from poor families in the big cities of South-East Asia and Africa. Mr. Abdelwahab Bouhdiba made reference to these facts in his report, mentioned above, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (see annex II). UNICEF gave them wide publicity in Ideas Forum. 17/

D. Observations on chapter I

41. To avoid making the text of this report too cumbersome, the author has not on every occasion cited the sources on which he has drawn in support of the facts being presented. These sources may be found in the list of the organizations consulted (see annexes IV and V), in the short bibliography (annex VI), which itself makes reference to other sources, in the reports of Mr. Bouhdiba (annex II) and Mr. Whitaker (annex III) and in the synopsis prepared by the Centre for Human Rights (E/CN.4/Sub.2/AC.2/1982/13 and addenda; see annex VI.22 (a)).

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- 42. The Rapporteur has intentionally refrained from dealing with adult male prostitution in its various forms: homosexual, heterosexual, mixed (transvestite). He took the view that the Economic and Social Council, in stressing the traffic in women and children, did not consider these relatively recent forms of prostitution as being of the same degree of urgency. Furthermore, procuring, which is our priority concern, does not seem to be nearly as well organized in that field. However, that complex subject, which would entail study of the medical, social and legal aspects of the phenomenon of transsexuality, merits special consideration, perhaps jointly by the World Health Organization, the Centre for Social Development and INTERPOL.
- 43. Similarly, there are two issues, although associated, which have deliberately not been considered here: the selling of young girls into domestic service and the international traffic in young children for adoption. The traffic in young domestics was reported on by Mr. Abdelwahab Bouhdiba (see annex II, paras. 115 and 116). It is of interest to us in this context by reason of its potential consequences, for it can lead to the sexual exploitation of the children in the employer's family and later to their drifting into prostitution. From the point of view of its origins, however, it is more relevant to the programme being carried out by the International Labour Organisation to combat forced child labour. The international traffic in young children for adoption, which is also a form of traffic in persons, is in itself a subject which should be given separate treatment in a specific study. The Sub-Commission on Prevention of Discrimination and Protection of Minorities stated specifically, in paragraph 14 of resolution 1982/15, "that a report on the causes and implications of the sale of children, including commercially motivated (and especially transnational) adoptions, should be prepared". 18/
- 44. In a largely clandestine field of this kind, precise statistics are unattainable. With the exception of a few countries, the only statistics available are those for cases prosecuted: these are no more than an infinitesimal part of the phenomenon being studied. As was noted already in the 1959 report,

"Statistical information ... does not reflect with any degree of accuracy the extent of the problem. In fact, the reported number of offences related to the exploitation of the prostitution of others is obviously greater in countries where all activities relating to the exploitation of prostitution are made punishable offences than in countries which do not punish such activities, or which punish only certain forms of exploitation. Furthermore, effective law enforcement may result in an increase in the number of the offences recorded although the actual number of the offences committed or attempted may not have been necessarily greater." 19/

In any case, the important point is not the scale of the phenomenon in terms of numbers but its degree of seriousness as a violation of the fundamental rights of the human person. In the terms of General Assembly resolution 32/130 of 16 December 1977, that violation is "mass and flagrant"; it therefore requires, in the words of the same resolution, "priority" attention from the international community.

- 45. The analysis given in the preceding pages deals with the overall machinery. It can justifiably be described as a machinery, for it is possible to discern a chain reaction of causes and effects. The reader is invited to adapt the information given to his or her own regional situation or specific national situation and may wish to forward comments to the Secretary-General of the United Nations and to the Special Rapporteur, if so desired.
- 46. But there would be no point in even an accurate description of the phenomenon of prostitution if an analysis of the situation was not followed by proposals for action. This will be the purpose of chapters II and III of this report.

Chapter II

NATIONAL POLICIES

A. The weight of opinion

- 47. It is clear that there will be no lasting change in respect of prostitution until collective attitudes begin to change. As long as the prostitute is regarded as a fallen and irredeemable woman and an outcast, the most altruistic individuals will pass her by and ignore her, and those who pride themselves on being enlightened will continue to believe that prostitution is a necessary outlet for those needs of man that cannot be satisfied by marriage. As to the procurer, it will continue to be believed that, although admittedly he is engaged in a most unpleasant profession, the police and the courts have other priorities.
- 48. It is, in fact, the very image of woman, who is too often regarded as a sexual object at the disposal of man, which must be changed. That is specifically requested of States in the Convention of 18 December 1979 on the Elimination of All Forms of Discrimination against Women (see annex IX). However, this image is still solidly rooted in most popular cultures, although in every culture religious leaders, social workers, political militants and writers are evolving and trying to communicate a better image of women. This false image is to be found first of all in the male mentality, but too often it is transmitted by the female mentality itself. The Director-General of UNESCO has made some very pertinent observations on this subject (see annex XI).
- 49. This report will not be of great assistance to the specialized non-governmental organizations, particularly women's organizations, which are already working courageously for the necessary change in attitudes. Perhaps, however, it will reach other organizations with broader objectives: those which protect human rights in general, family associations, associations of teachers and educators and associations concerned with the protection of children. The Special Rapporteur's aim is above all, in this second chapter, to stimulate and facilitate the thinking of international institutions and States. What stage have they reached in their thinking? Have they evolved a policy?

B. The spirit of the Convention

- 50. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (see annex VII) was adopted by the United Nations General Assembly on 2 December 1949 (resolution 317 (IV)). It was adopted by a fairly small majority, and only a minority of States (see annex VIII) has ratified it. Since 1949, however, the many resolutions referring to the Convention and inviting Member States to sign, ratify and implement it have been adopted by consensus. It may therefore be said that the Convention now reflects the philosophy of the overwhelming majority of members of the international community. What is this philosophy?
- 51. According to the Convention, prostitution and the accompanying evil of the traffic in persons "are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community". The abolition of prostitution is not specifically envisaged, however, and it is not considered to be a crime. Instead, the signatory States prohibit any law, regulation or administrative provision which discriminates against persons who engage in or are suspected of engaging in prostitution (art. 6). What is unlawful and punishable, however, is procurement (arts. 1 to 4). States must co-operate in suppressing it (arts. 7 to 15).
- 52. Why has the Convention, which entered into force on 25 July 1951, so far been ratified by only 53 States (see annex VIII)? It can only be assumed that, without being in basic disagreement with its philosophy, other States have not felt that the question is important and, therefore, have not yet wanted to take the trouble to change their legislation and regulations so as to bring them into line with the Convention.

C. State practice

- 53. In the history of prostitution, jurists distinguish three successive or parallel trends: prohibitionism, regulationism and abolitionism.
- 54. The prohibitionist system, which exists under certain régimes with strict moral codes, prohibits prostitution and punishes the prostitute. However, it discriminates between men and women, since, at least as far as the Special Rapporteur is aware, it does not punish the client.
- 55. The regulationist system, on the other hand, tolerates prostitution, which is considered to be "a necessary evil". However, it regulates it for the sake of hygiene or decency in public places. The effect of such regulation is to relegate the prostitute to a marginal position and make it virtually impossible for her to escape. This is the policy of countries which allow or set up houses of prostitution. It was the general practice in colonized territories.

- 56. The most recent phenomenon, the abolitionist system, is the tendency reflected in the 1949 Convention. As has already been noted, under abolitionism although prostitution is considered incompatible with the dignity of the human person, it is not prohibited, for it is regarded as a personal choice, and hence a private matter; the aim, instead, is to abolish the exploitation of prostitution.
- 57. Prohibitionist legislation is difficult to enforce, if only because it forces prostitution into clandestinity. It is observed only in States in which the private life of citizens is subjected by the entire environment to rigorous moral censure and where any moral deviation is quickly brought to the attention of the authorities. As to abolitionism, it is not found anywhere in an unadulterated state: it is always associated with some degree of regulation. This can be explained fairly easily. Even a liberal State has to regulate any activity which poses dangers to society. Fishing, hunting, gambling and automobile driving are legal; nevertheless, they are regulated because of the dangers they may involve for nature or people, yet it is not claimed that such regulation encroaches on freedom. The same applies to prostitution: it cannot escape a certain degree of regulation motivated by concern for public hygiene (medical checks, which are not always imposed on the clients!) and decency (suppression of the crime of indecent conduct, prohibition of active soliciting) or the protection of the children (prohibition of loitering in the neighbourhood of schools).
- 58. Excessive regulation is always counter-productive. Since it necessarily involves the intervention of the police, it leads the prostitute to be considered and to consider herself as a criminal. Fleeing from the police, she seeks support elsewhere. Where can she find that support but in the underworld? Thus any regulation which is too strict further isolates the prostitute and, consequently, makes it even more difficult for her to be rehabilitated.
- 59. Under an abolitionist system, bearing in mind the dual concern to protect society and not further to isolate the prostitute, the possibility of registering and taxing prostitutes may be considered. The Special Rapporteur will confine himself to setting forth the arguments, without taking sides.
- 60. Registration is in principle prohibited by the Convention of 2 December 1949 (art. 6). Nevertheless, it does exist. Police officers responsible for the suppression of the traffic in persons consider it essential to their task. Since the crime of procuring consists of his mercantile relationship with the prostitute, he cannot be caught unless the prostitute is known and watched. Moreover, it is impossible to prevent an administration from maintaining records. The prostitute, however, considers registration as an indelible mark; she fears that its effects will be with her all her life. She asks at least that her name should be removed from the register if she abandons prostitution, and that it should be prohibited to reveal her past activity to a prospective employer.
- 61. Taxation, in a democracy, is levied on all citizens whose income is above a level determined by law. The earnings of prostitutes far exceed this level, even though the money earned merely passes through their hands and ends up in the pockets of the procurer. It is more difficult for the inland revenue service to recover tax from the procurer, who has more than one trick up his sleeve, than from

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the prostitute, who is defenceless. Is taxation of the prostitute justified? Strict abolitionists oppose it, arguing that it amounts to recognizing prostitution as a profession. This objection is valid only if the activity producing the taxable earnings is specifically mentioned in the taxpayer's returns or in the assessment of her income by the inland revenue service. Another argument is that the State, by enriching itself from prostitution, is itself performing the function of procurer. This last argument is difficult to refute when demands for previous years are so high that the taxpayer, in order to pay, is forced to continue to engage in prostitution.

62. These two questions, among others, must be resolved by any State wishing to evolve a coherent policy on this matter.

D. A national policy

- 63. The first question which arises for a State is that of the objective to be pursued. Is it sufficient (the 1949 Convention requires nothing more) to combat the exploitation of prostitution, i.e. procuring? Or is it necessary to go further and aim, in the long term, to abolish prostitution itself? This is in part a false problem since combating the exploitation of an evil (whether alcoholism or drug addiction) necessarily limits the spread of that evil. It is clear that, if there were fewer procurers, fewer women would be trapped in the underworld, and more women would succeed in extricating themselves. Nevertheless, the fundamental question remains. A radical solution would not be acceptable to social workers and associations. The realistic answer, in the view of the Special Rapporteur, is to combat procuring, now and in the short term, while aiming in the long term at reducing actual prostitution. This is not Utopian, provided that economic and social inequalities between countries and within each country are lessened and women have access to a variety of properly paid jobs. Under these conditions it may be hoped that in the long term normal sexual needs (if not artificially exacerbated) will be satisfied in non-commercial relationships. The remaining needs, of a pathological nature (deviations), would then be treated by appropriate therapy.
- 64. If, in line with the philosophy of the 1949 Convention, these objectives are accepted, what would be the elements of a coherent national policy? In order to reply to this question, observations provided by countries themselves would have been useful. In particular, it would have been interesting to have information, rather than brief optimistic affirmations, on the extent to which a system of social equality and full employment succeeds in eliminating prostitution and its exploitation despite the persistence of other types of antisocial conduct which are manifested in other forms in the same society. The time available to the Special Rapporteur (the cause of the second omission in his report) did not allow him to approach the Governments of all Member States, and he did not wish to do so in a selective manner. It may be seen from the 1959 report that at that time seven countries had tried to formulate a programme of action by appointing a national committee to study the problem. 20/ Those countries were Burma, Denmark, India, Israel, Japan, Thailand and the United Kingdom of Great Britain and Northern Ireland. Since no additional information is available, this report cannot do

justice to the efforts made since then by the Governments of those seven countries. Since 1959, it would not appear, on the basis of the replies submitted to the annual questionnaire from the Division (now the Centre) for Human Rights, that other countries have in turn established similar committees. However, it is not possible to rely on those replies, since there are too few of them. It is public knowledge that at least two other States have recently carried out methodical studies of this subject: Sweden and France.

- 65. In Sweden, a committee of experts chaired by Mrs. Inger Lindquist, member of parliament, was requested by the Government in 1977 to prepare a study on prostitution. The committee's report, over 800 pages long, gave rise to a long debate in parliament and among the public. The report recommended two types of measure, the first type restrictive and prohibitive, and the second educational and supportive. Concurrently, from the end of 1977, an experiment was carried out by the municipality of Malmö, which closed the sex clubs and, by that measure and other measures, succeeded in bringing about a marked decline in prostitution. The Swedish Government provided financial support for the continuation of that experiment, which has already been extended to Gothenburg.
- 66. In France, the question of prostitution was posed in a dramatic fashion in 1975 when prostitutes at Lyon, in a protest against police and income tax practices, occupied several churches, and the movement continued in other towns. The Government then requested Mr. Guy Pinot, a member of the judiciary, to conduct an inquiry. His report served as a basis for the work of an interministerial group convened in October 1981 by the Minister for the Rights of Women. In April 1982, the group's conclusions were made available to interested associations. The Secretary of State for the Family, in turn, decided, at the beginning of 1983, to set up a second interministerial group on the subject of the protection of minors against exploitation by the pornographic industry and prostitution.
- 67. It would be useful if the Economic and Social Council were to invite all Governments, not simply at the time of the next annual questionnaire from the United Nations Centre for Human Rights, but preferably in an earlier separate letter, to indicate whether, within the context of the Government or Parliament, they have set up a body to carry out a global study of the problem of prostitution. This report could constitute one of the elements of that study. Already if the policies evolved in Sweden and France are compared, it may be noted that both share a common approach: mere suppression of procuring is ineffective unless accompanied by educational and social action. A member of the judiciary active in the suppression of procuring recently expressed his opinion as follows: if there is no effective machinery for rehabilitation, it is better not to expose the prostitute to the risks involved in denunciation of her procurer. More specifically, each of the two policies evolved by the two countries contain four principal elements forming an inseparable whole. These are: before prostitution, preventive measures; at the time of prostitution, elimination of isolating discrimination and suppression of procuring; after prostitution, assistance in rehabilitation. These are roughly the elements already recommended in the 1959 report. 21/ In developing them as a suggestion submitted for consideration by all Member States, the Special Rapporteur will use not only the known elements of existing national policies, but also the views expressed by the majority of social workers and competent associations.

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- Prevention means ensuring as far as possible equality of access for women and men to training and employment. At the same time, it means changing the image of women in the collective mentality by giving children moral and civic education in school, including education to promote mutual respect between men and women and preparation for family responsibilities. It also involves imposing limits on eroticism and suppressing pornography, whatever medium it employs: the press, films, video cassettes, sex shops, shows. It would be illogical to give free rein to what excites the senses, while condemning as immoral the means of assuaging that excitement. Since there are some intellectuals who defend paedophilia, and national legislation and judicial precedent do not punish this; literary form of encouragement to vice, their influence must be combated by publicizing the findings of physicians and medical associations, which could be endorsed by the World Health Organization, on the lasting dangers to children's minds and bodies caused by sexual acts imposed on them by adults, and the social cost of such trauma. Prevention also involves informing parents and increasing the number of teachers in open environments: youth clubs, sports clubs, health clubs. As Mr. Abdelwahab Bouhdiba has noted on the subject of the exploitation of child labour and the prostitution of children, information and sensitization of public opinion will long remain the most effective means of all in-depth action. 22/
- 69. Elimination of discrimination means abolition of sexist discrimination in general and also of discrimination which places prostitutes in a marginal situation. It means not treating them as criminals an attitude which (in addition to being incompatible with the 1949 Convention) maintains their dependence on the world of procurers, which is the world of crime, and makes their social rehabilitation more difficult. The question of registration, referred to above (para. 60), arises in this context. If a Government or a municipality wishes permanently or temporarily to prohibit soliciting in public places on the ground that it is an offence against public order, decency or tranquillity, prostitutes should not be punished unless clients are too. Once a violation has been established and a fine imposed, there should not be any registration.
- 70. Suppression of procuring means threatening it under the law with sufficiently deterrent penalties (at least five years in prison the time it takes, according to former prostitutes, for a woman working for a procurer to regain her taste for freedom), and effectively prosecuting procurers (prosecution 1 time out of 10 is not a deterrent). It means prosecuting not only the pimp but all forms of procuring, including classified advertisements in the press. The exploitation of child prostitution must be punished even more severely, at least to the same degree as the crime of sexual abuse of a minor. In order both to prevent and to suppress the exploitation of prostitution, it is recommended that more women should be employed as police officers. This was one of the recommendations of the 1959 report. 23/
- 71. Promotion of the rehabilitation of prostitutes who gain their freedom involves, as already noted, recruiting more women to police forces, or at least to vice squads, expanding reception centres in hostels and in open environments, both public and private, making appropriate vocational training courses widely available to such persons, ensuring that their past is not revealed to prospective employers, and helping them to find work. In this connection, the attention of developing

countries is drawn to the possibility of preparing a project for the rehabilitation of women engaged in prostitution in poor areas, for consideration by the Voluntary Fund for the United Nations Decade for Women. According to a note from the United Nations Secretary-General addressed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities on 17 June 1982, this project should be formulated with the assistance of the United Nations Development Programme or the regional commission and transmitted for evaluation to the Centre for Social Development and Humanitarian Affairs (Advancement of Women Branch) before being submitted to the Consultative Committee on the Fund. This procedure, if followed by several countries, would require a replenishment of the Voluntary Fund, since its resources are running out. It does not preclude direct use, in accordance with the normal procedure, of the resources of the United Nations Development Programme. Already in 1976, this Programme, in liaison with the Centre for Social Development and Humanitarian Affairs (Crime Prevention and Criminal Justice Branch) financed an expert study and training fellowship for one student, at the request of an African country. It would presumably finance larger projects. Naturally an appropriate arrangement for rehabilitation requires a certain level of investment. but perhaps less than might initially be thought. A survey made in a country in West Africa 24/ shows that 13 per cent of the women engaged in prostitution in the capital would be prepared to abandon that practice if they could obtain a sewing machine. Is it beyond the capacity of a State, with the assistance of international solidarity, to meet such a request?

E. The role of associations

- 72. No national policy to combat the exploitation of prostitution can be implemented solely with State means; associations must also be included in this endeavour. Associations have considerable knowledge about the field and frequently maintain close contacts with prostitutes themselves. Associations can also take risks and can thus uncover and venture to reveal unacceptable situations, which the authorities must then take into account.
- 73. In addition to humanitarian associations and charities, two types of association deserve special attention. The first is dedicated to the prevention of prostitution and to the rehabilitation of prostitutes. These associations are generally composed of former prostitutes and run by them. In seeking to free their former comrades, these activists are by definition highly motivated and are well-equipped through their experience in the field to prevent prostitution and to help to rehabilitate other prostitutes.
- 74. The second type of association is similar to a corporate body of prostitutes still engaged in their profession. At first sight, these associations may seem shocking in that their aggressiveness is directed primarily against the authorities. Some observers feel that, since procurers tolerate them, they are in fact serving the procurers' interests. However, others feel that, by learning how to organize and express themselves, to become familiar with their rights and obligations and to analyse different situations, the prostitutes involved in the second type of association gradually acquire a degree of autonomy which, sooner or later, will enable them to free themselves from the world of crime. Trusting in

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the benefits of life within an association, the Special Rapporteur tends to share this optimistic view and to recommend that such associations should be granted recognition and even assistance, provided that they do not call for prostitution to be recognized as a profession.

Chapter III

INTERNATIONAL CO-OPERATION

A. Its importance and conditions

- 75. The world-wide existence of prostitution and of international networks dealing in the traffic of women and children highlight the urgent need for international co-operation specifically in this field, not only so as to enable Member States to compare their national policies but also to organize joint action.
- 76. Economic poverty, particularly in disadvantaged rural areas and in the poor urban suburbs created by the rural exodus, has been recognized as the most common reason why women and children (the latter sometimes with the complicity of their parents) fall into prostitution. Accordingly, the Programme of Action adopted by the World Conference on Agrarian Reform and Rural Development, held at Rome from 12 to 20 July 1979, 25/ is particularly relevant. As part of its programme for the integration of women in development, the Food and Agriculture Organization of the United Nations followed up this Conference with the elaboration of the "Community Action Programme for Disadvantaged Rural Women". The projects included in this Programme focus on increasing food production and income-earning activities. Projects have been initiated in Kenya, Mexico, Sri Lanka, the Sudan, the Yemen Arab Republic and Zambia. 26/ The needs and the situation of children in rural areas are also among the problems FAO has dealt with as part of the follow-up to the Conference. More generally, it is clear that progress in the context of the International Development Strategy for the Third United Nations Development Decade and the establishment of a new, more equitable international economic order would spare many people the need to resort to prostitution in order to survive. However, the expectation of these still uncertain and distant improvements should not relieve Governments of their obligation immediately to take any measures currently within their means. Using anticipated long-term results as an excuse for neglecting present duties would constitute failure to assist a person in danger, which some criminal laws categorize as a crime.
- 77. Consequently, in view of present circumstances, international action should be organized immediately in order to establish exchanges of reliable information, to familiarize people with the tactics of procurers, to identify the networks they use and to pool the experience States have already acquired in the field of prevention and rehabilitation. One State alone cannot defend itself against the exploitation of prostitution; all States have a stake in such co-operation. Of course, co-operation may to a certain extent be conducted through bilateral channels: as soon as a Government learns that a flow of prostitutes is arriving in its territory, either in transit or for a lengthy period of time, it should immediately ask the Government of the country of origin to investigate the matter. Identifying



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Have nominated as their plenipotentiaries for this purpose,

The President of the Supreme Council of Albania:

M. B. Blinishti, Director of the Albanian secretariat accredited to the League of Nations.

The President of the German Reich:

M. Gottfried Aschmann, Counsellor of Legation, in charge of the German Consulate at Geneva.

The President of the Austrian Republic:

M. Emeric Pflügl, Resident Minister, representative of the Federal Government accredited to the League of Nations.

His Majesty the King of the Belgians:

M. Maurice Dullaert, delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of the United States of Brazil:

Dr. Afranio de Mello Franco, President of the Brazilian delegation at the Fourth Assembly of the League of Nations.

His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas; Emperor of India:

Sir Archibald Bodkin, Director of Public Prosecutions; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications;

Mr. S. W. Harris, C.B., C.V.O., Technical Adviser of the British delegation at the said conference;

and

for the Union of South Africa:

The Right Hon. Lord Parmoor, representative of the British Empire on the Council of the League of Nations;

for the Dominion of New Zealand:

The Hon. Sir James Allen, K.C.B., High Commissioner for New Zealand in the United Kingdom;

for India:

Sir Prabhashankar D. Pattani, K.C.I.E.;

for the Irish Free State :

Mr. Michael MacWhite, representative of the Free State accredited to the League of Nations.

His Majesty the King of the Bulgarians:

M. Ch. Kalfoff, Minister for Foreign Affairs, first delegate of Bulgaria at the Fourth Assembly of the League of Nations.

The President of the Chinese Republic:

Mr. Tcheng Loh, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Colombia:

M. Francisco José Urrutia, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications. The President of the Republic of Costa Rica:

M. Manuel M. de Perulta, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Cuba:

M. Cosme de la Torriente y Peraza, Senator; president of the Cuban delegation at the Fourth Assembly of the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Denmark:

M. A. Oldenburg, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; representative of Denmark accredited to the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Spain:

M. E. de Palacios, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Finland:

M. Urho Toivola, secretary at the Finnish Legation in Paris.

The President of the French Republic:

- M. Gaston Deschamps, Deputy; president of the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.
- M. J. Hennequin, Honorary Director at the Ministry for Home Affairs; substitute delegate at the said Conference.

His Majesty the King of the Hellenes:

- M. N. Politis, former Minister for Foreign Affairs; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.
- M. D. E. Castorkis, former Director of Criminal Affairs at the Ministry of Justice; substitute delegate at the said conference.

The President of the Republic of Haiti:

M. Bonamy, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Honduras:

M. Carlos Gutierrez, Chargé d'Affaires in Paris; delegate at the Fourth Assembly of the League of Nations.

His Serene Highness the Governor of Hungary:

M. Zoltán Baranyai, head of the Royal Hungarian secretariat accredited to the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Italy:

M. Stefano Cavazzoni, Deputy; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the Emperor of Japan:

Mr. Y. Sugimura, assistant head of the Japanese League of Nations Office in Paris.

The President of the Republic of Latvia:

M. Julijs Feldmans, head of the League of Nations Section of the Ministry for Foreign Affairs; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Lithuania:

M. Ignace Jonynas, Director of the Ministry for Foreign Affairs; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

Her Royal Highness the Grand Duchess of Luxemburg:

M. Charles Vermaire, Consul of the Grand-Duchy at Geneva; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Serene Highness the Prince of Monaco:

M. Rodolphe Ellès-Privat, Vice-Consul of the Principality at Geneva; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Republic of Panamá:

M. R. A. Amador, Chargé d'Affaires in Paris; delegate at the Fourth Assembly of the League of Nations.

Her Majesty the Queen of the Netherlands:

M. A. de Graaf, president of the Netherlands Committee for the Suppression of the White Slave Traffic; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications. His Imperial Majesty the Shah of Persia:

His Highness Prince Mirza Riza Kahn Arfa-ed-Dovleh, representative of the Imperial Government accredited to the League of Nations; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Polish Republic:

M. F. Sokal, Inspector-General of Labour; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications;

and for

the Free City of Danzig:

M. J. Modzelewski, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council.

The President of the Portuguese Republic:

Dr. Augusto C. d'Almeida Vasconcellos Correa, Minister Plenipotentiary; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Roumania :

M. N. P. Comnène, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council.

The President of the Republic of Salvador:

M. J. G. Guerrero, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic and to His Majesty the King of Italy; delegate at the Fourth Assembly of the League of Nations.

His Majesty the King of the Serbs, Croats and Slovenes:

Dr. Milutin Jovanovitch, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

His Majesty the King of Siam:

His Serene Highness Prince Damras Damrong; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The Swiss Federal Council:

M. Ernest Béguin, Deputy to the States Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

The President of the Czechoslovak Republic:

Dr. Robert Flieder, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications. the President of the Turkish Republic: Ruchdy Bey, Chargé d'Affaires at Berne,

the President of the Republic of Uruguay:

M. Benjamin Fernandez y Medina, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of Spain; delegate at the International Conference for the Suppression of the Circulation of and Traffic in Obscene Publications.

Who, having communicated their full powers, found in good and due form,

And having taken cognisance of the Final Act of this Conference and of the Agreement of the 4th May, 1910,

Have agreed upon the following provisions:-

ARTICLE 1.

The High Contracting Parties agree to take all measures to tecover, prosecute and punish any person engaged in committing ty of the following offences, and accordingly agree that:—

It shall be a punishable offence-

 For purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects;

2. For the purposes above mentioned to import, convey or export or cause to be imported, conveyed or exported any of the said obscene matters or things, or in any manner what-

soever to put them into circulation;

3. To carry on or take part in a business, whether public or private, concerned with any of the said obscene matters or things, or to deal in the said matters or things in any manner whatsoever, or to distribute them or to exhibit them publicly or to make a business of lending them;

4. To advertise or make known by any means whatsoever, in view of assisting in the said punishable circulation or traffic, that a person is engaged in any of the above punishable acts, or to advertise or to make known how or from whom the said obscene matters or things can be procured either directly or indirectly.

ARTICLE 2.

Persons who have committed an offence falling under article 1 shall be amenable to the courts of the Contracting Party in whose territories the offence, or any of the constitutive elements of the offence, was committed. They shall also be amenable, when the laws of the country shall permit it, to the courts of the Contracting Party whose nationals they are, if they are found in its territories,

even if the constitutive elements of the offence were committed

outside such territories.

Each Contracting Party shall, however, have the right to apply the maxim non bis in idem in accordance with the rules laid down in its legislation.

ARTICLE 3.

The transmission of rogatory commissions relating to offences falling under the present convention shall be effected either-

1. By direct communication between the judicial authorities; or 2. Through the diplomatic or the consular representative of the country making the request in the country to which the request is made; this representative shall send the rogatory commission direct to the competent judicial authority or to the authority appointed by the Government of the country to which the request is made, and shall receive direct from such authority the papers showing the execution of the rogatory commission.

In each of the above cases a copy of the rogatory commission shall always be sent to the supreme authority

of the country to which application is made.

3. Or through diplomatic channels.

Each Contracting Party shall notify to each of the other Contracting Parties the method or methods of transmission mentioned above which it will recognise for rogatory commissions of such Party.

Any difficulties which may arise in connection with transmission by methods 1 and 2 of the present article shall be settled through

diplomatic channels.

Unless otherwise agreed, the rogatory commission shall be drawn up in the language of the authority to which request is made, or in a language agreed upon by the two countries concerned, or shall be accompanied by a translation in one of these two languages certified by a diplomatic or consular agent of the country making the request or certified on his oath by a translator of the country to which request is made.

Execution of rogatory commissions shall not be subject to

payment of taxes or expenses of any nature whatsoever.

Nothing in this article shall be construed as an undertaking on the part of the Contracting Parties to adopt in their courts of law any form or methods of proof contrary to their laws.

ARTICLE 4.

Those of the Contracting Parties whose legislation is not at present adequate to give effect to the present convention, undertake to take, or to propose to their respective legislatures, the measures necessary for this purpose.

ARTICLE 5.

The Contracting Parties whose legislation is not at present diment for the purpose, agree to make provision for the searching fany premises where there is reason to believe that the obscene natters or things mentioned in article 1 or any thereof are being or deposited for any of the purposes specified in the said of the control of its provisions, and for their seizure, detention and destruction.

ARTICLE 6.

The Contracting Parties agree that, in case of any violation of the provisions of article 1 on the territory of one of the Contracting lattics where it appears that the matter or thing in respect of shigh the violation of such article has occurred was produced in a imported from the territory of any other of the Contracting Parties, the authority designated in pursuance of the agreement of the 4th May, 1910, of such Contracting Party shall immediately sender to the corresponding authority of the other Contracting Party, from whose country such matter or thing is believed to have one or in which it is believed to have been produced, full aformation so as to enable such authority to adopt such measures as shall appear to be suitable.

ARTICLE 7.

The present convention, of which the French and English texts are authoritative, shall bear this day's date, and shall be open for signature until the 31st March, 1924, by any State represented at the conference, by any member of the League of Nations, and by any State to which the Council of the League of Nations shall have communicated a copy of the convention for this purpose.

ARTICLE 8.

The present convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the League of Nations, who shall notify the receipt of them to members of the League who are signatories of the convention and to other signatory States.

The Secretary-General of the League of Nations shall immediately communicate a certified copy of each of the instruments deposited, with reference to this convention, to the Government of the French Republic.

In compliance with the provisions of article 18 of the Covenant of the League of Nations, the Secretary-General will register the bresent convention upon the day of its coming into force.

ARTICLE 9.

After the 81st March, 1924, the present convention may be adhered to by any State represented at the conference which has not signed the convention, by any member of the League of Nations,

or by any State to which the Council of the League of Nations shall have communicated a copy of the convention for this purpose.

Adhesion shall be effected by an instrument communicated to the Secretary-General of the League of Nations to be deposited in the archives of the secretariat. The Secretary-General shull at once notify such deposit to all members of the League of Nations signatories of the convention and to other signatory States.

ARTICLE 10.

Ratification of or adhesion to the present convention shall ipso facto, and without special notification, involve concomitant and full acceptance of the agreement of the 4th May, 1910, which shall come into force on the same date as the convention itself in the whole of the territory of the ratifying or adhering member of the League or State.

Article 4 of the above-mentioned agreement of the 4th May, 1910, shall not, however, be invalidated by the preceding provision, but shall remain applicable should any State prefer to adhere to

that agreement only.

ARTICLE 11.

The present convention shall come into force on the thirtieth day after the deposit of two ratifications with the Secretary-General of the League of Nations.

ARTICLE 12.

The present convention may be denounced by an instrument in writing addressed to the Secretary-General of the League of Nations. The denunciation shall become effective one year after the date of the receipt of the instrument of denunciation by the Secretary-General, and shall operate only in respect of the members of the League of Nations or State which makes it.

The Secretary-General of the League of Nations shall notify the receipt of any such denunciation to all members of the League of Nations signatories of or adherents to the convention and to other

signatory or adherent States.

Denunciation of the present convention shall not, ipso facto, involve the concomitant denunciation of the agreement of the 4th May, 1910, unless this is expressly stated in the instrument of notification.

ARTICLE 13.

Any member of the League of Nations or State signing or adhering to the present convention may declare that its signature or adhesion does not include any or all of its colonies, overseas possessions, protectorates or territories under its sovereignty or authority, and may subsequently adhere separately on behalf of any such colony, overseas possession, protectorate or territory so excluded in its declaration.

tanciation may also be made separately in respect of any tony, overseas possession, protectorate or territory under its centy or authority, and the provisions of article 12 shall apply such denunciation.

ARTICLE 14.

A special record shall be kept by the Secretary-General of the arm of Nations, showing which of the parties have signed, add, adhered to or denounced the present convention. This add shall be open at all times to any of the members of the arm of Nations or any State which has signed or adhered to the various. It shall be published as often as possible.

ARTICLE 15.

Disputes between the parties relating to the interpretation or neution of this convention shall, if they cannot be settled by a negotiation, be referred for decision to the Permanent Court International Justice. In case either or both of the parties to such a ispute should not be parties to the protocol of signature of the Permanent Court of International Justice, the dispute shall be a ferred, at the choice of the parties, either to the Permanent Court of International Justice or to arbitration.

ARTICLE 16.

Upon a request for a revision of the present convention by five of the signatory or adherent parties to the convention, the Council of the League of Nations shall call a conference for that purpose. In any event, the Council will consider the desirability of calling a conference at the end of each period of five years.

In faith whereof the above-named Plenipotentiaries have agreed the present convention.

Done at Geneva the 12th day of September, 1928, in two originals, of which one shall remain deposited in the archives of the League of Nations and the other shall remain deposited in the archives of the Government of the French Republic.

Albania:

B. BLINISHTI.

Germany:

Subject to ratification. (Translation.)
GOTTFRIED ASCHMANN

Austria:

E. PFLUGL (ad referendum).



733	League of Nations — Treaty Series.	t761
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SALVADOR	J. GUSTAYO GUERRERO	SALVADOR
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MAIS	The Siamese Government reserve full right to enforce the provisions of the present Convention against foreigners in Siam in accordance with the principles prevailing for applying Siamese legislation to such foreigners t.	MAIS
dit idabanii	DANKAS	
2MITZERLAND	E BECNIN	SUISSE
CSECHOSTOAYKIY	Dr Robert FLIEDER	TCHĘCOSTONYÕNIE
LOKKEX	КССНДХ	TURQUIE
URUGUAY	B. FERVANDEZ Y MEDINA	URUGUAY

 $^{\rm I}$ Le Gouvernement siamois se réserve entièrement le droit d'obliger les étrangers se trouvant au Siam à observer les dispositions de la présente Convention, conformément aux principes qui régissent l'application de la législation siamoise aux étrangers. : 521011 : suounN Traduction du Secrétariat de la Société des Na-Translation by the Secretariat of the League of

No. 685

PORTUGAL	Augusto DE VASCONCELLOS	PORTUGAL
DYMISIC AIFFE FIBBE DE	1 MODZETEMRKI	DYASIC EKEE CILK OE
POLOGNE	F. SOKAL	DOFYND
BEKSE	PRINCE ARFA-ED-DOVLEH (ad velevendum)	PERSIA
PAYS-BAS	A. DE GRAAF	NETHERLANDS
PANAMA	R. A. AMADOR	PAZAMA
MONYCO	K. ELLËS-PRIVAT	MOZYCO
гахемволье	CH. G. VERMAIRE	глхеивске
TILHOVNIE	Ic. JONYNAS	LITHUANIA
TELLONIE	1. FELDNIANS	AIVTAJ
	En signant la Convention internationale pour la répression de la circulation et du trafic des publications obscènce, je, soussigné, déclare que ma signature n'engage ni Formose, ni la Karatuto, ni les territoires à bail de Kwantung, ni de la presente Convention ne portent pas atteinte à l'action faite par le pouvoir judiciaire teinte à l'action faite par le pouvoir judiciaire du Japon en appliquant les lois et décrets japonais.	
lapon	Y. SUGIMURA	lapax
ITALIE	CAVAZZONI STEFANO	ILALY
HONGEIE	Dr Zoltán BARANYAI	HOZEVEK
HONDURAS	Ad rejerendum. Carlos GUTIERREZ	HONDURAS
ITIAH	N. BONAMY	ITIAH
скесе	N. POLITIS. D. E. CASTORKIS	CKEECE
E KYNCE	САБТОМ DESCHAMPS. J. HENNEGUIN	EBYNCE
737	Société des Nations - Recueil des Traités.	7761

Traduction du Secrétariat de la Société des Na- Translation dy the Secretariat of the League of tions:

¹ In signing the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, I, the undersigned, declare that my signature is not binding in respect of Taiwan, Chosen, the leased territory of Kwantung, Karafuto or the territories under Japanese mandate, and that the provisions of Article 15 of the present Convention are not in any way derogatory to the acts of the Japanese judicial authorities in the application of Japanese judicial authorities and Japanese judicial authorities authorities and Japanese judicial authorities authorities authorities and Japanese judicial authorities authorities authorities authorities and Japanese judicial authorities authorities and Japanese judicial authorities authoriti

INFYNDE	AJOVIOT OHAU	EINTVND
ESPAGNE	EMILIO DE PALACIOS	NIAGS
	v. огреивикс	
DYNEWYKK	En signant la Convention élaborée par la Concence, je soussigné, délégué du Gouvernement danois, déclare, relativement à l'article 4 (voir l'article premier) ce qui suit : D'après les rèces énoncés à l'article premier que s'ils sont prévus par l'article premier que s'ils sont prévus par l'article premier que s'ils sont qui punit quiconque publie un écrit obscène ou qui met en vente, distribue, répand d'autre namière ou expose publiquement des images obscènes. En outre, il est à remarquer que la législation danoise sur la presse contient des dispositions spéciales relatives aux personnes dispositions est en tant que ces puresse. Ces dispositions sont applicables aux actes prévus à l'article 184 en tant que ces actes prévus à l'article 184 en tant que ces actes prévus à l'article 184 en tant que ces actes prevuent être poursuivies nour délits de actes prevuent être considérés comme délits de presse. L'application de la législation dancie sur ces points doit attendre la revision noise sur ces points doit attendre la revision probablement prochaine du Code pénal danois 3. A. O.	DENNYBK
CUBA	COSME DE LA TORRIENTE	COBA
COSTA-RICA	Ad referendum. Manuel M. DE PERALTA	COSTA RICA
	FRANCISCO JOSÉ URRUTIA	
COFONBIE	Con reserva de la ulterior aprobacion legislativa ¹ .	COFOMBIY
CHINE	Денеме ГОН	CHINY
BOLGARIE	CH. KALFOFF	BULGARIA

Parlement. L' Sous réserve de l'approbation ultérieure du

rationals.

In signing the Convention drawn up by the International Conference on Obscene Publications, I, the undersigned Delegate of the Danish Government, make, with regard to Article 4 (see also Article 1), the undersigned Delegate of the Danish Government, make, with regard to Article 4 (see also Article 1) the bollowing declaration: "The acts mentioned in Article 134 of the Danish Penal Code, which inflicts penalties upon any person publishing obscene writings, or placing on sale, distributing, or otherwise circulating or publicly exposing obscene images. Further, it is to be observed that the Danish legislation relating to the Press contains special provisions on the aubject of the persons who may be prosecuted for Press offences. The latter provisions apply, to the acts covered by Article 134 in so far as these acts can be considered as Press offences. Application of Danish legislation on these points must await the revision of the Danish Penal Code, which is likely to be effected in the near future". ment.

a Subject to the subsequent approval of Parlia-

potentiaries have agreed the present Convention. In faith whereof the above-named Pleni

Republic. archives of the Government of the French and the other shall remain deposited in the ited in the archives of the League of Nations in two originals of which one shall remain depos-Done at Geneva the twelfth day of September one thousand nine hundred and twenty-three,

> més ont signé la présente Convention. En foi de quoi, les plénipotentiaires susnom-

publique française. dans les archives du Gouvernement de la Ré-Société des Nations et l'autre restera déposé dont l'un restera deposé aux archives de la cent vingt-trois, en deux exemplaires originaux, Fait à Genève, le douze septembre mil neuf

INDIA	Рялвиляная D. РАТТАМІ	INDE
NE/A SETEVAD	J. ALLEN Mestern Samoa 4. J. A. of Western Samoa 4. J. A.	SELAUDE NOUVELLE-
UXION OF SOUTH	PARMOOR 3	CVINE NNION SND-VEBI-
BRITISH EMPIRE S. W. HARRIS.	I declare that my signature does not include any of the Colonies, Overseas Possessions, Protectorates or Territories under His Britannic Majesty's Sovereignty or Authority ² . A. H. B. A. H. BODKIN,	EMPIRE BRITAU- NIQUE
BRAZIL	YEBVZIO DE WEITO EKYZCO	BRÉSIL
BEFCINI	MAURICE DULLAERT	BETCIÕNE
AIJTSUA	49 referendum. E. PFLUGL	AUTRICHE
CEENY//.	Cottered ASCHMANN (Vorbehaltlich der Ratifikation)	VILEMAGNE
ALBAKIA	B. BLINISHTI	YFBYNIE

: suouvN Translations by the Secretariat of the League of

Traductions du Secrétariat de la Société des Na-

L'Sous réserve de ratification,

DIBLANDE

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des protectorats ou territoires placés sons la souveraineté ou l'autorité de Sa Majesté Britannique. 2 Je déclare que ma signature n'engage aucune des colonies ou possessions d'outre-mer, ni aucun 1 Subject to ratification.

MICHAEL MACWHITE

3 Lord Parmoor's signature includes the Tertitory under His Britannic Majesty's mandate of South-West Africa. au Sud-Ouest africain. $^{\rm s}$ La signature de Lord Parmoor engage le territoire sous mandat de Sa Majesté Britannique

Ma signature engage le territoire sous mandat du Samoa occidental. Translation.

IKIZH EKEE STATE

Article 12.

Nations ou l'Etat dénonçant. réception par le Secrétaire général et n'aura d'effet qu'en ce qui concerne le Membre de la Société général de la Société des Nations. La dénonciation deviendra effective un an après la date de sa La présente Convention peut être dénoncée par notification écrite, adressée au Secrétaire

bres de la Société des Nations signataires de la Convention ou adhérents à la Convention et des Le Secrétaire général de la Société des Vations portera à la connaissance de chacun des Mem-

autres Etats signataires ou adhérents toute dénonciation reçue par lui.

The second state of the second second

mitante de l'Arrangement du 4 mai 1910, à moins qu'il n'en soit fait mention expresse dans l'acte La dénonciation de la présente Convention n'entraînera pas de plein droit dénonciation conco-

possessions d'outre-mer ou territoires exclus par cette déclaration. ultérieurement, adhèrer séparément au nom de l'un quelconque de ses protectorats, colonies, possessions d'outre-mer ou territoires soumis à sa souveraineté ou à son autorité, et peut, signature ou son adhesion n'engage pas, soit l'ensemble, soit tel de ses protectorats, colonies, Tout Membre de la Société des Nations ou Etat signataire ou adhérent peut déclarer que sa

possession d'outre-mer ou territoire soumis à sa souveraineté ou autorité ; les dispositions de l'ar-La dénonciation pourra également s'effectuer séparément pour tout protectorat, colonic,

ticle 12 s'appliqueront à cette dénonciation.

Article 14.

ou autre Etat signataire ou adhérent. Elle sera publiée aussi souvent que possible. denoncée. Cette liste pourra être consultée en tout temps par les Membres de la Société des Mations sont celles des Parties qui ont signé la Convention, qui l'ont ratifiée, qui y ont adhéré, ou qui l'ont Le Secrétaire général de la Société des Nations tiendra un recueil spécial indiquant quelles

Article 15.

un arbitrage. ou accepté le protocole de signature de la Cour permanente de Justice internationale, leur diftérend sera soumis, au gré des Parties, soit à la Cour permanente de Justice internationale, soit à rend sera soumis, au gré des Parties, soit à la Cour permanente de Justice internationale, soit à Si les Parties entre lesquelles surgit un différend, ou l'une d'elles, se trouvaient n'avoir pas signé des négociations directes, renvoyés pour décision à la Cour permanente de Justice internationale, Tous les différends qui pourraient s'élèver entre les Parties contractantes au sujet de l'inter-prétation ou de l'application de la présente Convention seront, s'ils ne peuvent étre réglés par

Article 16.

le Conseil examinera, à la fin de chaque période de cinq années, l'opportunité de cette convocation. le Conseil de la Société des Mations devra convoquer une Conférence à cet effet. Dans tous les cas, Si cinq des Parties signataires ou adhérentes demandent la revision de la présente Convention,

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de prendre les mesures nécessaires. de cette autre Partie et lui fournira en même temps des renseignements complets, pour lui permettre désignée, en vertu de l'Arrangement du 4 mai 1910, signalera immédiatement les faits à l'autorité fraction ont été fabriqués sur le territoire ou importés du territoire d'une autre Partie, l'autorité

Article 7.

aura, à cet effet, communiqué un exemplaire de la présente Convention. La présente Convention, dont les textes trançais et angleis feront foi, portera la date de jour, et sera, jusqu'au 31 mars 1924, ouverte à la signature de tout Etat représenté à la Conférence, de tout Membre de la Société des Nations et de tout Etat à qui le Conseil de la Société des Nations

Article S.

Société des Nations signataires de la Convention, ainsi qu'aux autres Etats signataires. Le Secrétaire général de la Société des Nations communiquera immédiatement au Gouverne-ment de la République française copie certifiée conforme de tout instrument se rapportant à la mis au Secrétaire général de la Société des Nations, qui en notifiera le dépôt aux Membres de la La présente Convention est sujette à ratification. Les instruments de ratification seront trans-

présente Convention.

taire général enregistrera la présente Convention le jour de l'entrée en vigueur de cette dernière. Conformément aux dispositions de l'article 18 du Pacte de la Société des Nations, le Secré-

A partir du 31 mars 1924, tout Etat représenté à la Conférence et non signataire de la Con-

Cette adhesion s'effectuera au moyen d'un instrument communique au Secrétaire général de Nations aura, à cet effet, communiqué un exemplaire, pourra adhérer à la présente Convention. vention, tout Membre de la Société des Nations et tout Etat auquel le Conseil de la Société des

vention, ainsi qu'aux autres Etats signataires. la Société des Nations, aux fins de dépôt dans les archives du Secrétariat. Le Secrétaire général notifiera ce dépôt immédiatement aux Membres de la Société des Zations signataires de la Con-

ANTICLE IO.

ble du territoire de l'Etat ou du Membre de la Société des Nations ratifiant ou adhérent. du 4 mai 1910, qui entrera en vigueur à la même date que la Convention elle-même, dans l'ensem-La ratification de la présente Convention, ainsi que l'adhésion à cette Convention entraîne-ront, de plein droit et sans notification spéciale, adhésion concomitante et entière à l'Arrangement

II n'est toutefois pas dérogé, par la disposition précédente, à l'article 4 de l'Arrangement précité du 4 mai 1910, qui demeure applicable au cas où un Etat prélérerait faire acte d'adhésion

a cet Arrangement seulement.

Article II.

ratifications par le Secrétaire général de la Société des Nations. La présente Convention entrera en vigueur le trentième jour qui suivra la réception de deux

d'après les règles admises par sa législation. Il appartient toutefois à chaque Partie contractante d'appliquer la maxime non bis in idem

Article 3.

Convention s'opérera : La transmission des commissions rogatoires relatives aux infractions visées par la présente

1. Soit par communication directe entre les autorités judiciaires;

directement de cette autorité les pièces constatant l'exécution de la commission rogatoire. cisire compétente ou à celle désignée par le Couvernement du pays requis et recevra le pays requis. Cet agent enverra directement la commission rogatoire à l'autorité judiz. Soit par l'entremise de l'agent diplomatique ou consulaire du pays requérant dans

Dans ces deux cas, copie de la commission rogatoire sera toujours adressée en même temps à l'autorité supérieure du pays requis ;

Soit par la voie diplomatique.

autres Parties contractantes, celui ou ceux des modes de transmission susvisés qu'elle admet pour les commissions rogatoires de cette Partie. Chaque Partie contractante fera connaître, par une communication adressée à chacune des

du present article seront réglées par la voie diplomatique. Toutes les difficultés qui s'élèveraient à l'occasion des transmissions opérées dans les cas 1 et 2

Sauf entente contraire, les purission rogatoire doit être rédigée soit dans la langue de l'autorité requise, soit dans la langue convenue entre les deux pays intéressés, ou bien, elle doit être accompagnée d'une traduction faite dans une de ces deux jangues et certifiée conforme par un accompagnée d'une traduction faite dans une de ces deux jangues et certifiée conforme par un accompagnée d'une traduction faite dans une de ces deux jangues expusition de pays requisité.

ou frais de quelque nature que ce soit. L'exécution des commissions rogatoires ne pourra donner lieu au remboursement de taxes agent diplomatique ou consulaire du pays requérant ou par un traducteur-juré du pays requis.

répressive, une dérogation à leurs lois. contractantes, un engagement d'admettre, en ce qui concerne le système des preuves en matière Rien, dans le présent article, ne pourra être interprêté comme consituant, de la part des Parties

ner effet à la présente Convention, s'engagent à prendre ou à proposer à leurs législatures respec-tives les mesures nécessaires à cet égard. Les Parties contractantes dont la législation ne serait pas, dès à présent, suffisante pour don-

Article 5.

cation et la destruction. des écrits, dessins, gravures, peintures, imprimés, images, affiches, emblèmes, photographics. films cinématographiques ou autres objets obscènes et d'en prévoir également la saisie, la confisd'y prévoir des perquisitions dans les lieux où il y a des raisons de croire que se fabriquent ou se trouvent, en vue de l'un quelconque des buts spécifiés à l'article 1 ou en violation de cet article, Les Parties contractantes dont la législation ne sera pas dès à présent suffisante, conviennent

ticle 1, commise sur le territoire de l'une d'elles, lorsqu'il y a licu de croire que les objets de l'in-Les Parties contractantes conviennent que, dans le cas d'infraction aux dispositions de l'ar-

LE CONSEIL FÉDÉRAL SUISSE:

pour la répression de la circulation et du trafic des publications obscènes. M. Ernest Breuin, député au Conseil des Etats; délégué à la Conférence internationale

LE PRESIDENT DE LA RÉPUBLIQUE TCHÉCOSLOVAQUE:

M. le Dr Robert FLIEDER, envoyé extraordinaire et ministre plénipotentiaire près le Conseil fédéral suisse ; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes.

RUCHDY BEY, charge d'Affaires à Berne. LE PRÉSIDENT DE LA RÉPUBLIQUE TURQUE:

LE PRÉSIDENT DE LA RÉPUBLIQUE DE L'URUGUAY:

M. Benjamin Fernandez y Mediua, envoyé extraordinaire et ministre plénipotentiaire près Sa Majesté le Roi d'Espagne; délégué à la Conférence internationale peur la répression de la circulation et du trafic des publications obscènes.

avoir pris connaissance de l'Acte final de la Conférence et de l'Arrangement du 4 mai 1910, sont convenus des dispositions suivantes: Lesquels, ayant communique leurs pleins pouvoirs, trouvés en bonne et due forme, et après

Article I.

Doit être puni le fait : et, en conséquence, décident que de poursuivre et de punir tout individu qui se rendra coupable de l'un des actes énumérés ci-dessous Les Hantes Parties contractantes conviennent de prendre toutes mesures en vue de découvrir,

r. De fabriquer ou de détenir des écrits, dessins, gravures, peintures, imprimés, images, affiches, emblèmes, photographies, films cinématographiques ou autres objets obscènes, en vue d'en faire commerce ou distribution, ou de les exposer publiquement;

2. D'importer, de transporter, d'exporter ou de faire importer, transporter ou exporter, aux fins ci-dessus, les dits écrits, dessins, gravures, peintures, imprimés, images, affiches, emblèmes, photographies, films cinématographiques ou autres objets obscènes, ou de les mettre en circulation d'une manière qualongue.

3. D'en faire le commerce même non public, d'effectuer toute opération les concernant de quelque manière que ce soit, de les distribuer, de les exposer publiquement ou de faire métier de

gravures, peintures, imprimés, images, affiches, emblemes, photographies, films cinématographieques ou autres objets obscènes peuvent être procurés, soit directement, soit indirectement. tion ou le trafic à réprimer, qu'une personne se livre à l'un quelconque des actes punissables énumérés ci-dessus; d'annoncer ou de faire connaître comment et par qui les dits écirts, dessins: mèrés ci-dessus; d'annoncer ou de faire connaître comment et par qui les dits écirts, dessins. 4. D'annoncer ou de faire connaître par un moyen quelconque, en vue de favoriser la circula-

constitutifs du délit auraient été accomplis en dehors de son territoire. titutifs du délit. Ils seront également justiciables, lorsque sa législation le permettra, des tribunaux du pays contractant auquel ils ressortissent, s'ils y sont trouvés, alors même que les éléments des tribunaux du pays contractant où aura été accompli soit le délit, soit l'un des éléments cons-Les individus qui auront commis l'une des infractions prévues à l'article 1 seront justiciables

SON ALTESSE ROYALE LA GRANDE DUCHESSE DE LUXEMBOURG:

M. Charles Vermaire, consul du Grand-Duché à Genève ; délégué à la Conférence internationale pour la répression de la circulation, et du trafic des publications obscènces.

A VENNE Status with the biddle remineral business is continued as a continued and the

SON ALTESSE SÉRÉVISSIME LE PRINCE DE MONACO:

M. Rodolphe Ellès-Privat, vice-consul de la Principauté à Genève ; délégué à la Conference internationale pour la répression de la circulation et du trafic des publications obscènces.

LE PRÉSIDENT DE LA RÉPUBLIQUE DE PANAMA:

M. R. A. Amador, chargé d'Affaires à Paris ; délégué à la quatrième Assemblée de la Société des Mations.

SA MAJESTE LA REINE DES PAYS-BAS:

M. A. DE GRARF, président du Comité néerlandais pour la répression de la traite des blanches; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes.

SA MAJESTÉ IMPÉRIALE LE SHAH DE PERSE:

S. A. le Prince Mirza Riza Kahn Arra-ed-Dovleh, représentant du Gouvernement impérial auprès de la Société des Nations; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes.

Le Président de la République polonaise : M. F. Sokal, inspecteur général du travail ; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes ; et

POUR LA VILLE LIBRE DE DANTZIG : M. J. MODZELEWSKI, ENVOVÉ EXITROIGINAITE ET ministre plénipotentiaire près la Conseni

N. J. Modzelewski, envoyé extraordinaire et ministre plénipotentiaire près le Conseil fédéral suisse.

LE PRÉSIDENT DE LA RÉPUBLIQUE PORTUGAISE :

M. le Dr Augusto C. р'Алметра Vascoucer.cos Совяета, ministre plénipotentiaire; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes.

5.4 MAJESTE LE KOI DE KOUMANIE:
M. N. P. Сомиèме, envoyé extraordinaire et ministre plénipotentiaire près le Conseil fédéral suisse.

LE PRÉSIDENT DE LA RÉPUBLIQUE DE SALVADOR:

M. J. G. GUERRERO, envoyé extraordinaire et ministre plénipotentiaire près le Président de la République française et près Sa Majesté le Roi d'Italie; délégué à la quatrième Assemblée de la Société des Nations.

SA MAJESTÉ LE ROI DES SERBES, CROATES ET SLOVÈNES:

M. le Dr Milutin Jovanovitch, envoyé extraordinaire et ministre plénipotentiaire près le Conseil fédéral suisse ; délégué à la Conférence internationale pour la répression de la circulation et du traite des publications obscènes.

SA MAJESTÉ LE ROI DE SIAM:

S. A. S. le Prince Damras Damrouc, délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes.

publications obscenes. à la Conférence internationale pour la répression de la circulation et du trafic des

SA MAJESTÉ LE ROI D'ESPACNE :

fédéral suisse; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes. M. E. DE PALACIOS, envoyé extraordinaire et ministre plénipotentiaire près le Conseil

LE PRÉSIDENT DE LA RÉPUBLIQUE DE FINLANDE:

M. Urho Torvola, secrétaire à la Légation de Finlande à Paris.

LE PRÉSIDENT DE LA RÉPUBLIQUE FRANÇAISE:

M. Gaston Deschanps, député; président de la Conférence internationale pour la ré-pression de la circulation et du trafic des publications obscènes.

M. J. HENNEQUIN, directeur honoraire au Ministère de l'Intérieur ; délégué suppléant à la dite Conférence.

SA MAJESTÉ LE ROI DES HELLÈNES:

délégué suppléant à la dite Conférence. M. D. E. CASTORKIS, ancien directeur des Affaires pénales au Ministère de la Justice; tionale pour la répression de la circulation et du trafic des publications obscènes. M. W. Politis, ancien ministre des Affaires étrangères ; délégué à la Conférence interna-

LE PRÉSIDENT DE LA RÉPUBLIQUE DE HAITI:

République française; délégué à la Conférence interna ionalé pour la répression de la circulation et du trafic des publications obscènes. М. Вомаму, envoyé extraordinaire et ministre plénipotentiaire près le Président de la

LE PRÉSIDENT DE LA RÉPUBLIQUE DU HONDURAS:

la Société des Nations. M. Carlos Gutterrez, chargé d'Affaires à Paris; délégué à la quatrième Assemblée de

M. Zoltán Baranyai, chef du Secrétariat royal hongrois auprès de la Société des Nations; Sou Altesse Sérénissime Le Gouverneur De Hongrie:

A MAJESTÉ LE ROI D'ITALIE: trafic des publications obscènes. délégué à la Conférence internationale pour la répression de la circulation et du

SA MAJESTÉ L'ЕмРЕRЕUR DU JAPON: M. Stefano CAVAZZOM, député ; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes.

M. Y. Suchura, chef adjoint au Bureau du Japon pour la S ciété des Nations, à Paris.

tion et du trafic des publications obscenes. étrangères ; délégus à la Conférence internationale pour la répression de la circula-M. Julijs Feldmans, chef de la Section de la Société des Mations au Ministère des Affaires LE PRÉSIDENT DE LA RÉPUBLIQUE DE LETTONIE:

LE PRÉSIDENT DE LA RÉPUBLIQUE LITHUANIENNE:

opaceuea. rence internationale pour la répression de la circulation et du trafic des publications M. Ignace Joyvyas, directeur au Ministère des Affaires étrangères ; délégué à la Confé-

LE PRÉSIDENT DE LA RÉPUBLIQUE DES ETATS-UNIS DU BRÉSIL:

M. le Dr Afranio de Melle Mello Franco, président de la délégation brésilienne à la quatrième Assemblée de la Société des Nations.

SA MAJESTÉ LE ROI DU ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE ET DES DOMINIOUS

Sir Archibald Bopkix, Director of Public Prosecutions; délégué à la Conférence inter-BRITANNIQUES AU DELA DES MERS, EMPEREUR DES INDES:

nationale pour la répression de la circulation et du trafic des publications obscènes.

dite Conférence; et M. S. W. Навкіз, С.В., С.V.О., conseiller technique de la délégation britannique à la

POUR L'UNION SUD-AFRICAINE:

la Société des Nations. Le Très Honorable Lord Parmoor, représentant de l'Empire britannique au Conseil de

POUR LE DOMINION DE LA NOUVELLE-ZELANDE :

L'Honorable sir James Allen, K.C.B., haut commissaire pour la Nouvelle-Zélande dans le Royaume-Uni.

SOUR L'INDE :

Sir Prabhashankar D. Pattani, K.C.I.E.

M. Michael Mac White, représentant de l'Etat libre auprès de la Société des Lations. SOUR L'ETAT LIBRE D'IRLAUDE :

SA MAJESTÉ LE ROI DES BULGARES:

quatrième Assemblée de la Société des Nations. M. Ch. Кылготт, ministre des Affaires étrangères, premier délégué de la Bulgarie à la

LE PRÉSIDENT DE LA RÉPUBLIQUE DE CHINE:

la République française; délégué à la Conférence infernationale pour la répression de la circulation et du trafic des publications obscènes. M. Tcheng Lou, envoyé extraordinaire et ministre plénipotentiaire près le Président de

LE PRÉSIDENT DE LA RÉPUBLIQUE DE COLOMBIE :

la circulation et du trafic des publications obscènes. M. Francisco José Uквити, envoyé extraordinaire et ministre plénipotentiaire près le Conseil fédéral suisse ; délégué à la Conférence internationale pour la répression de

LE PRESIDENT DE LA KEPUBLIQUE DE COSTA-RICA:

M. Manuel M. De Peralta, envoyé extraordinaire et ministre plénipotentiaire près le Président de la République française; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènes.

LE PRÉSIDENT DE LA RÉPUBLIQUE DE CUBA:

M. Cosme de la Torrient y Peraza, sénateur.; président de la délégation enbaine à la quatrième Assemblée de la Société des Nations ; délégué à la Conférence internationale pour la répression de la circulation et du trafic des publications obscènces.

SA MAJESTÉ LE ROI DE DANEMARK:

tédéral suisse, représentant du Danemark auprès de la Société des Nations ; délègue M. A. Oldenburg, envoyé extraordinaire et ministre plénipotentiaire près le Conseil

TEMBRE 1923 AU 31 MARS 1924. OBSCENES' ONVERTE A LA SIGNATURE, A GENEVE, DU 12 SEP-DE LA CIRCULATION ET DU TRAFIC DES PUBLICATIONS No. 685. — CONVENTION 1 INTERNATIONALE POUR LA RÉPRESSION

Société des Vairons le 7 août 1924, conjormément aux termes de l'article 8. Textes officiels anglais et français. Cette Convention a été enregistrée par le Secrétariat de la

Egalement désireux de donner le plus d'efficacité possible à la répression de la circulation et ET SLOVÈNES, LE SIAM, LA SUISSE, LA TCHÉCOSLOVAQUIE, LA TURQUIE ET L'URCUAY: LA BULGARIE, LA CHINE, LA COLONBIE, COSTA-RICA, CUBA, LE DAZENARA, L'ESPACZE, LA FIZ-TANDE, LA FRANCE, LA GRÈCE, HAITI, LE HONDURAS, LA HOSER PAYS-BAS, LA PERSE, LA PLOCUCZE (AVEC DANTZIG), LE PORTUCALI, LA ROUMANIE, LE SALVADOR, LE ROYAUXE DES SERBES, CROATES ET SLOVÈNES, LE SIAM, LA SUISSE LA TCHÉCOSTONARIE, LA TUBOUR DES SERBES, CROATES ET SLOVÈNES, LE SIAM, LA SUISSE LA TCHÉCOSTONARIE, LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE. LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE, LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE, LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE. LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE, LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE, LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE. LA TUBOUR DE L'ESTANDA LA SUISSE LA TCHÉCOSTONARIE. LA TUBOUR DE L'ESTANDA L'ES L'ALBANIE, L'ALLENAGNE, L'AUTRICHE, LA BELGIQUE, LE BRÉSIL, L'ENPIRE BRITANIQUE (AVEC L'UNION SUD-AFRICAINE, LA MOUVELLE-ZÉLANDE, L'INDE ET L'ETAT LIBRE D'IRLANDE),

Ayant accepté l'invitation du Gouvernement de la République française en vue de prendre part à une Conférence convoquée le 31 août 1923, à Genève, sous les auspices de la Société des Nations, pour l'examen du projet de Convention élaboré en 1910, et des observations formulées par les divers Etate ainsi que pour élaborer et signer en texte de la Société des la sanction de la convention de la con du trafic des publications obscènes,

par les divers Etats, ainsi que pour élaborer et signer un texte définitif de Convention,

Ont nommé comme plénipotentiaires à cet effet :

TE PRÉSIDENT DU REICH ALLEMAND:

M. B. BLINISHTI, directeur du Secrétariat albanais auprès de la So ciété des Nations. LE PRÉSIDENT DU CONSEIL SUPRÈME D'ALBANIE:

ГЕ Рибягреит ре гл Веривлюче р'Антвісне: М. Cottfried Aschmann, conseiller de Légation, chargé du Consulat d'Allemagne à Genève.

M. Emeric Preüer, ministre résident, représentant du Gouvernement fédéral auprès de la Société des Mations.

circulation et du trafic des publications obscènes. M. Maurice Dullaert, délégué à la Conférence internationale pour la répression de la SA MAJESTÉ LE ROI DES BELGES:

¹ Dépôt des instruments de ratification: Bulgarie le 1 juillet 1924, Italie le 8 juillet 1924, Siam le 28 juillet 1924, Albanie 13 octobre 1924, Espagne 19 décembre 1924, — Cette Convention est entrée en vigueur le 7 août 1924, conformément à son article 11.

L'Egypte a adhéré à la Convention le 29 octobre 1924, le Pérou a adhéré «ad referendum» le 15 septembre 1924.

internationale, de satisfaire une telle requête? condre. Est-il au-dessus de la capacité d'un Etat, assisté par la solidarité pretes à abandonner cette pratique si elles pouvaient obtenir une machine à parmi les femmes qui exercent la prostitution dans la capitale, 13 p. 100 seraient abord. D'une enquête faite dans un pays d'Afrique occidentale 24/, il résulte que, investissement, mais peut-être plus faible qu'on pourrait le penser au premier importants. Un bon dispositif de réinsertion exige, bien entendu, un certain et la formation d'un boursier. On peut imaginer qu'il finance des projets plus criminelle) a financé en 1976, à la demande d'un pays africain, une étude d'expert affaires humanitaires (Service de la prévention du crime et de la justice Déjà ce programme, en liaison avec le Centre du développement social et des habituelle, aux ressources du Programme des Nations Unies pour le développement. feugeur a s'épuiser. Elle n'exclut pas le recours direct, selon la procédure un réapprovisionnement du Fonds de contributions volontaires, dont les ressources du Fonds. Cette procédure, si elle est suivie par plusieurs pays, exigera (Service de la promotion de la femme) avant d'être présenté au Comité consultatif pour évaluation au Centre du développement social et des affaires humanitaires Nations Unies pour le développement ou de la commission régionale et communiqué

E. Le rôle des associations

73. Parmi ces associations, outre les associations humanitaires et caritatives, deux types méritent un intérêt particulier. Le premier type est celui de l'association vouée à la prévention et à la réinsertion qui est fondée et animée en majeure partie par d'anciennes prostituées. Cherchant à libérer leurs anciennes camarades, ces militantes sont par définition très motivées, et bien armées par camarades, ces militantes sont par définition très motivées, et bien armées par tematades, ces militantes sont par définition et sontribuer à la réinsertion.

Prostituées qui exercent encore leur activité. Celle-là peut avoir à première vue prostituées qui exercent encore leur activité. Celle-là peut avoir à première vue un caractère choquant, parce que son agressivité est tournée d'abord contre les pouvoirs publics. Certains observateurs pensent que, puisqu'elle est tolérée par les proxénètes, elle sert objectivement leurs intérêts. D'autres estiment en revanche qu'en apprenant à s'organiser, à s'exprimer, à connaître leurs droits et obligations, et à analyser une situation, les prostituées qui militent dans une telle association acquièrent peu à peu une autonomie qui leur permettra, tôt ou une telle association acquièrent peu à peu une autonomie qui leur permettra, tôt ou eat, de s'émanciper de la tutelle du milieu du crime. Ayant confiance en la vertu de la vie associative, le Rapporteur spécial a tendance à partager cette vue optimiste et a conseillé de reconnaître et même aider une telle association, pourvu ou l'alle ne revendique pas la reconnaître et même aider une telle association, pourvu une profession.

font l'apologie de la pédophilie, et si la législation et la jurisprudence nationales ne répriment pas cette forme littéraire d'incitation à la débauche, il y a lieu de combattre leur influence en faisant connaftre les constations de médecins, et d'associations de médecins, que pourrait cautionner l'Organisation mondiale de la santé, sur les dangers durables que causent au psychisme et au corps des enfants les actes sexuels qui leur sont imposés par des adultes, ainsi que le coût social de de ces traumatismes. Prévenir, c'est encore informer les parents et multiplier le nombre des éducateurs en milieu ouvert : clubs de jeunes, clubs sportifs, clubs de prévention. Comme l'a écrit M. Abdelwahab Bouhdiba à propos de l'exploitation du l'opinion publique demeureront longtemps encore les voies les plus efficaces de l'opinion publique demeureront longtemps encore les voies les plus efficaces de toute action en profondeur 22V.

69. Eliminer les discriminations s'entend des discriminations sexistes en général et des discriminations qui marginalisent les prostituées. C'est renoncer à les traiter comme des délinquantes, puisque ce comportement (outre qu'il est incompatible avec la Convention de 1949) entretient leur dépendance à l'égard du milieu des proxénètes, qui est le milieu du crime, et augmente les difficultés de dont il a été question sociale. C'est dans ce cadre que se pose la question du fichage, dont il a été question plus haut (par. 60). Si un gouvernement ou une municipalité dont il a été question plus haut (par. 60). Si un gouvernement ou une municipalité des publique comme contraire à l'ordre public, à la pudeur ou à la tranquillité des publique comme contraire prostituées ne devraient pas étre punies si les clients ne le sont pas. La contravention constatée, entraînant une amende, ne devrait pas être accompagnée d'un fichage.

70. Réprimer le proxénétisme, c'est le menacer par la loi de peines assez dissuasives (au moins cinq ans de prison, temps nécessaire, selon d'anciennes prostituées, pour permettre à une femme soumise à un proxénète de réacquérir le goût de la liberté), et c'est le poursuivre effectivement (poursuivre un proxénète une fois sur dix ne constitue pas une dissuasion). C'est poursuivre non pas seulement le souteneur, mais toutes les formes de proxénétisme sans négliger un contrôle des petites annonces dans la presse. L'exploitation de la prostitution enfantine doit être punie plus sévèrement encore, au moins autant que le délit d'abus sexuel sur un mineur. Aussi bien pour prévenir que pour réprimer d'abus sexuel sur un mineur. Aussi bien pour prévenir que pour réprimer d'abus sexuel sur un mineur, le soutement en certaine féminisation de la police est l'ecommandée. C'était déjà l'une des recommandations du rapport de 1959 23.

Tavoriser la réinsertion des prostituées qui se libèrent, c'est féminiser, comme il a été dit, la police, ou tout au moins la police des moeurs, multiplier les structures d'accueil en internat et en milieu ouvert, publiques et privées, ouvrir largement à ces personnes les stages de formation professionnelle appropriés, veiller à ce que leur passé ne soit pas révélé aux futurs employeurs et les aider dans la recherche d'un emploi. L'attention des pays en développement est appropriés, veiller à ce que leur passé ne soit pas révélé aux futurs employeurs et les appropriées ici sur la possibilité qu'ils ont d'élaborer, à l'intention du Fonds de contributions volontaires pour la Décennie de la femme, un projet tendant à la réadaptation des femmes se livrant à la prostitution dans les zones pauvres. Selon réadaptation des femmes se livrant à la prostitution dans les zones pauvres. Selon sorce du Secrétaire général des Nations Unies adressée le l7 juin 1982 à la sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, ce projet doit être élaboré avec l'aide du Programme des

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68. Prévenir, c'est garantir autant que possible l'égalité d'accès des femmes et des hommes aux formations et aux emplois. C'est en même temps modifier l'image de la femme dans la mentalité collective, en donnant aux enfants une éducation morale et civique à l'école comportant une éducation au respect mutuel entre l'homme et la femme et une préparation aux responsabilités familiales. C'est aussi mettre des limites à l'érotisme et faire obstacle à la pornographie, quels que soient les médias qu'elle emprunte : presse, films, vidéo-cassettes, "sex-shops", spectacles. Ne serait-il pas incohérent de laisser toute liberté à ce qui excite les sens, tout en condamnant comme immoraux les moyens de les apaiser? Si quelques intellectuels en condamnant comme immoraux les moyens de les apaiser? Si quelques intellectuels

exprimées par la majorité des travailleurs sociaux et des associations compétentes. les éléments connus des politiques nationales existantes, mais aussi les vues réflexion de tous les Etats membres, le Rapporteur spècial utilisera non seulement rapport de 1959 21/. En les développant comme une suggestion soumise à la la reconversion. Ce sont à peu de choses près les éléments déjà recommandés par le marginalisantes et la répression du proxénétisme; après la prostitution, une aide à principaux, qui forment un ensemble inséparable. Ce sont : avant la prostitution, des mesures préventives, pendant la prostitution, l'élimination des discriminations frouver dans chacune des deux politiques conques par ces deux pays quatre éléments comporte la dénonciation de son proxénète. D'une manière plus précise, on peut réinsertion efficace, il vaut mieux ne pas exposer la prostituée aux risques que récemment cette opinion comme suit : si l'on ne dispose pas d'un dispositif de Un magistrat qui s'est illustré dans la répression du proxénétisme exprimait inopérante si elle n'est pas accompagnée d'une action éducative et sociale. caractérisent par cette approche commune : la seule répression du proxénétisme est politiques conçues en Suède et en France, on constate que toutes deux se l'un des éléments de leur réflexion. D'ores et déjà, si l'on compare les globale sur le problème de la prostitution. Le présent rapport pourrait constituer du gouvernement ou dans celui du Parlement, un organe chargé d'une réflexion par une lettre antérieure séparée, à préciser s'ils ont mis en place, dans le cadre annuel du Centre des Nations Unies pour les droits de l'homme, mais de préférence économique et social, et pas simplement à l'occasion du prochain questionnaire 67. Il serait utile que tous les gouvernements soient invités par le Conseil

66. En France, la question de la prostitution a été posée d'une manière aiguë en 1975, quand les prostituées de Lyon, pour protester contre les pratiques de la police et du fisc, ont occupé plusieurs églises, mouvement qui a été suivi dans d'autres villes. Le gouvernement a alors confié à un magistrat, M. Guy pinot, le soin de mener une enquête. Son rapport a servi de base aux travaux du groupe interministériel, réuni au mois d'octobre 1981 par le Ministre des droits de la connaissance des associations intéressées. De son côté, le Secrétaire d'Etat à la famille a décidé de mettre en place, dès le début de 1983, un second groupe interministériel consacré à la protection des mineurs contre leur exploitation par interministériel consacré à la protection des mineurs contre leur exploitation par interministériel consacré à la protection des mineurs contre leur exploitation par l'industrie pornographique et par la prostitution.

depuis la fin de 1977, une expérience a été menée par la municipalité de Malmö, qui a fermé les "sex-clubs" et abouti, par là et par d'autres mesures, à une régression sensible de la prostitution. Le Gouvernement suédois a accordé un soutien financier à la poursuite de cette expérience, qui a déjà été étendue à Göteborg.

D. Une politique nationale

caractère pathologique (déviances), relèveraient alors d'une thérapie appropriée. seront satisfaits dans le cadre de l'amour non vénal. Les besoins résiduels, de espérer, les besoins sexuels normaux (s'ils ne sont pas artificiellement exacerbés) convenablement rémunérés. C'est dans ces conditions qu'à la longue, peut-on l'intérieur de chacun d'eux, et que les femmes aient accès à une variété d'emplois que s'atténuent les inégalités économiques et sociales entre les pays et à dépérissement de la prostitution elle-même. Celui-ci n'est pas une utopie pourvu l'immédiat et à court terme, contre le proxénétisme, tout en visant à long terme le associations. La réponse réaliste, au sentiment du Rapporteur, est de lutter, dans réponse tranchée ne recueillerait pas le consensus des travailleurs sociaux et des rèussissant à en sortir. La question fondamentale reste cependant posée. Une aurait moins de femmes tombant dans le piége du milieu" et plus de femmes l'extension de ce mal. Il est certain que, s'il y avait moins de proxénètes, il y l'exploitation d'un mal (que ce soit l'alcoolisme ou la drogue), c'est déjà limiter prostitution elle-mëme? C'est en partie un faux problème, puisque lutter contre proxénétisme? Ou faut-il aller plus loin et viser, à long terme, l'abolition de la lutter contre l'exploitation de la prostitution, c'est-à-dire contre le poursuivre. Convient-il de se borner (la Convention de 1949 ne demande pas plus) à 63. La première question qui se pose à cet Etat est celle de l'objectif à

une réflexion méthodique : ce sont la Suède et la France. publique que deux autres Etats au moins ont tout récemment mené sur ce sujet on ne peut se fonder sur ces réponses, trop peu nombreuses. Il est de notoriété l'homme, que d'autres pays aient établi à leur tour une semblable commission. Mais questionnaire annuel de la Division (devenue récemment Centre) des droits de sept pays. Depuis 1959 il ne semblerait pas, d'après les réponses fournies au rendre ici justice aux efforts accomplis depuis lors par les gouvernements de ces la Thaïlande. Faute d'informations supplémentaires, le présent rapport ne peut l'Inde, Israël, le Japon, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et nationale chargée d'étudier le problème 20/. C'étaient la Birmanie, le Danemark, s'étaient efforcés de formuler un programme d'action en nommant une Commission sélective. Si l'on se réfère au rapport de 1959, on lit qu'à cette date sept pays gouvernements des Etats Membres, et il n'a pas voulu le faire d'une manière deuxième lacune de son rapport) ne lui permettait pas d'interroger tous les dans la même société. Le temps imparti au Rapporteur (c'est la cause de la en dépit de conduites asociales persistantes qui se manifestent d'autres manières sociale et de plein emploi parvient à éliminer la prostitution et son exploitation des affirmations optimistes sommaires, dans quelle mesure un régime d'égalité les pays eux-mêmes. Il aurait été intéressant de savoir, notamment, mieux que par répondre à cette question, il aurait été utile de disposer d'exposés fournis par admis, quels seront les éléments d'une politique nationale cohérente? Pour 64. Ces objectifs, conformes à la philosophie de la Convention de 1949, étant

65. En Suède, un Comité des Sages, présidé par Mme Inger Lindquist, député, a été en 1977 chargé par le gouvernement de rédiger une étude sur la prostitution. Long de plus de 800 pages, son rapport a donné lieu à un large débat au Parlement et dans l'opinion publique. Il recommandait deux séries de mesures, les unes restrictives et prohibitives, les autres éducatives et de soutien. Parallèlement,

néanmoins réglementés à cause des dangers qu'ils peuvent comporter pour la nature ou pour la population, sans que l'on prétende qu'il y ait là atteinte aux libertés. Ainsi en est-il de la prostitution: elle ne peut pratiquement échapper à un certain degré de réglementation, inspirée par le souci de l'hygiène publique (contrôle médical, qui n'est toutefois pas imposé aux clients), de la décence (contrôle médical, qui n'est toutefois pas imposé aux clients), de la décence (tépression du délit d'outrage à la pudeur, interdiction du racolage actif) ou de (répression du délit d'outrage à la pudeur, interdiction du racolage actif) ou de protection des enfants (interdiction de stationner aux abords des écoles).

58. Une réglementation excessive va toutefois à l'encontre du but poursuivi. Faisant nécessairement intervenir la police, elle conduit la prostituée à être considérée et à se considérer elle-même comme une déliquante. Fuyant alors la police, elle cherchera ailleurs un soutien. Où pourrait-elle le trouver ailleurs police, elle cherchera ailleurs un soutien. Où pourrait-elle le trouver ailleurs que dans le "milieu"? C'est ainsi qu'une réglementation trop sévère marginalise davantage encore la prostituée et, par voie de conséquence, rend plus difficile encore sa réinsertion.

59. C'est en ayant à l'esprit la double préoccupation de protéger la société et de ne pas marginaliser davantage la prostituées et de leur imposition. Le Rapporteur sur l'opportunité du fichage des prostituées et de leur imposition. Le Rapporteur se bornera à exposer le débat sans prendre lui-même parti.

60. Le fichage est en principe interdit par la Convention du 2 décembre 1949 (art. 6). Cependant il existe. Les policiers chargés de la répression de la traite le considèrent comme indispensable à l'exercice de leur mission. Le délit du proxenète consistant dans son rapport mercantile avec la prostituée, comment le proxenète consistant dans son rapport mercantiler la prostituée? On ne peut du preste empêcher une administration de constituer des archives. Mais la prostituée reste empêcher une administration de constituer des archives. Mais la prostituée ressent le fichage comme une marque indélébile; elle craint que ses effets ne la poursuivent toute sa vie. Sa revendication minimum est d'être effectivement rayée du fichier si elle quitte la prostitution, et qu'il soit interdit de dénoncer son activité passée à l'employeur auquel elle demandera un emploi.

61. L'impôt, dans une démocratie, est dû par tous les citoyens dont le revenu dépasse le seuil déterminé par la loi. Les gains des prostituées dépassent largement ce seuil, même si l'argent gagné ne fait que passer dans leurs mains pour poutir dans la poche des proxénètes. Pour le fisc il est plus difficile de prostituée, qui est sans défense. L'imposition de cette dernière est-elle prostituée, qui est sans défense. L'imposition de cette dernière est-elle justifiée? Les abolitionnistes rigoureux le contestent, en disant qu'elle équivaut justifiée? Les abolituinnistes rigoureux le contestent, en disant qu'elle équivaut du est prostitution comme une profession. Cette objection n'est valable due si l'activité dont les gains sont imposés est expressément citée dans la declaration de la contribuable ou dans l'évaluation que le fisc fait de ses déclaration de la contribuable ou dans l'évaluation que le fisc fait de ses déclaration de la contribuable ou dans l'évaluation que le fisc fait de ses

déclaration de la contribuable ou dans l'evaluderon que l'Etat, en s'enrichissant à partir de la revenus. Un autre argument est que l'Etat, en s'enrichissant à partir de la prostitution, se fait lui-même proxénète. Ce dernier argument est difficilement prostitution, se fait lui-même proxénète des années antérieures est si élevée qu'elle réfutable quand l'exigence des impôts des années antérieures est si élevée qu'elle contraint l'imposable, pour pouvoir payer, à continuer de se prostituer.

concraine i imposable, pour pourore franchées, parmi d'autres, par tout Etat qui 62. Ces deux questions devront être tranchées, parmi d'autres, par tout Etat qui voudra se donner, en cette matière, une politique cohérente.

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51. La prostitution et le mal qui l'accompagne, selon la Convention, sont "incompatibles avec la dignité et la valeur de la personne humaine et mettent en danger le bien-être de l'individu, de la famille et de la communauté". Cependant son abolition n'est pas expressément visée, et elle n'est pas considérée comme un délit. Au contraire, les Etats signataires s'interdisent toute loi, règlement ou pratique administrative discriminatoire à l'égard des personnes qui s'y livrent ou sont soupçonnées de s'y livrer (art. 6). Ce qui, en revanche, est illicite et punissable, c'est le proxénétisme (art. 1 à 4). Les Etats doivent s'entraider pour le réprimer (art. 7 à 15).

52. Comment expliquer que la Convention, entrée en vigueur le 25 juillet 1951, n'ait été jusqu'à présent ratifiée que par 53 Etats (voir annexe VIII)? On peut seulement supposer que, sans être fondamentalement en désaccord avec sa philosophie, d'autres Etats n'ont pas considéré cette question comme importante et, dès lors, n'ont pas encore voulu prendre la peine de modifier, pour les adapter à la Convention, leur législation et leur réglementation.

C. Les pratiques des Etats

53. Dans l'histoire de la prostitution, les juristes distinguent trois tendances successives ou contemporaines : le prohibitionnisme, le réglementarisme et l'abolitionnisme.

54. Le prohibitionnisme, qui existe sous certains régimes ayant une morale austère, interdit la prostitution et punit la prostituée. Cependant il discrimine entre l'homme et la femme en ne punissant pas, tout au moins à la connaissance du Rapporteur spécial, le client.

55. Le réglementarisme, au contraire, tolère la prostitution, considérée comme "un mal nécessaire". Cependant il la réglemente au nom de l'hygiène ou de la décence dans les lieux publics. L'effet de cette réglementation est d'enfermer la personne prostituée dans une position marginale et de l'empêcher pratiquement de s'en évader. C'est la politique des pays qui acceptent ou instituent des maisons s'en évader. Ce fut la pratique générale dans les territoires colonisés.

56. Dernier apparu, <u>l'abolitionnisme</u> est la tendance que reflète la Convention de 1949. Comme il a été dit, l'abolitionnisme, tout en considérant la prostitution comme incompatible avec la dignité de la personne humaine, ne l'interdit pas, car il la considère comme un choix personnel, donc comme une affaire privée; il cherche, en revanche, à abolir son exploitation.

57. Une législation prohibitionniste est difficilement applicable, ne serait-ce que parce qu'elle repousse la prostitution dans la clandestinité. Elle n'est en fait respectée que dans les Etats où la vie privée des citoyens est soumise par tout l'environnement à une censure morale rigoureuse, et où tout écart dans le domaine des moeurs est bientôt porté à la connaissance des autorités. Quant à mêlé de réglementarisme. Cela s'explique assez aisément. L'Etat, même libéral, mêlé de réglementarisme. Cela s'explique assez aisément. L'Etat, même libéral, est conduit à réglementer toute activité qui présente des dangers pour la société. La pêche, la chasse, le jeu, la conduite automobile sont licites; ils sont

Chapitre II

DES POLITIQUES NATIONALES

A. Le poids de l'opinion

47. Il est clair que rien ne changera durablement, en matière de prostitution, tant que les mentalités collectives ne commenceront pas à changer. Aussi longtemps que la prostituée sera dans ces mentalités une femme perdue, irrécupérable, une réprouvée, les plus altruistes passeront à côté d'elle sans la regarder, et ceux qui se flattent de raison continueront de penser que la prostitution est un exutoire nécessaire à ces besoins de l'homme que le mariage ne peut satisfaire. Quant au proxénète, on continuera de penser qu'il exerce, certes, un bien vilain métier, mais que la police et la justice ont d'autres priorités.

48. En fait, c'est l'image même de la femme, trop généralement considérée comme un objet sexuel au service de l'homme, qui est à redresser. C'est ce que demande explicitement aux Etats la Convention du 18 décembre 1979 sur l'élimination de toutes les formes de discrimination à l'égard des femmes, (voir annexe IX). Or cette image est encore solidement ancrée dans la plupart des cultures populaires, encore que dans chacune, des hommes de religion, des travailleurs sociaux, des militants politiques et des écrivains conçoivent et s'efforcent de communiquer de militants politiques et des écrivains conçoivent et s'efforcent de communiquer de masculine, mais elle se transmet trop souvent par le mentalité féminine elle-même. Le Directeur général de l'Unesco a dit sur ce sujet des paroles très convaincantes (voir annexe XI).

49. Le présent rapport n'apportera pas grand concours aux organisations non gouvernementales spécialisées, notamment féminines, qui oeuvrent déjà avec courage pour le changement nécessaire des mentalités. Peut-être toutefois en touchera-t-il d'autres, qui ont des objectifs plus vastes : celles qui défendent d'une manière générale les droits de l'homme, les associations familiales, les associations d'enseignants et d'éducateurs et celles qui se vouent à la protection de l'enfance. L'ambition du Rapporteur spécial est surtout, dans ce deuxième l'enfance. L'ambition du Rapporteur spécial est surtout, dans ce deuxième des Etats. Les uns et les autres, où en sont-ils de leur réflexions ont-ils défini une politique?

B. L'esprit de la Convention

50. La Convention pour la répression et l'abolition de la traite des êtres humains et de l'exploitation de la prostitution d'autrui (voir annexe VII) a été adoptée par l'Assemblée générale des Nations Unies le 2 décembre 1949 (résolution des Etats (voir annexe VIII) l'a ratifiée. Depuis 1949, toutefois, les nombreuses résolutions qui s'y réfèrent et qui invitent les Etats membres à la signer, à la ratifiée et donc resolutions qui s'y réfèrent et qui invitent les Etats membres à la signer, à la ratifier et à la mettre en oeuvre ont été adoptées par consensus. Il est donc permis de dire qu'elle représente aujourd'hui la philosophie de la grande majorité de la communauté internationale. Cette philosophie, quelle est-elle?

leur adoption internationale, qui est aussi une forme de traite, c'est là un sujet en soi qui mérite un traitement séparé par une étude spécifique. La Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités a précisément estimé, dans sa résolution 1982/15, par. L4, "qu'il faudrait établir un rapport sur les causes et les incidences de la vente d'enfants, y compris les adoptions (en particulier transmationales) à caractère commercial 28.

44. Dans un domaine qui appartient en majeure partie à la clandestinité, on ne pouvait s'attendre à trouver des statistiques précises. A l'exception de quelques pays, les seules disponibles sont celles de la répression : elles n'atteignent qu'une partie infime du phénomène étudié. Comme le notait déjà le rapport de 1959,

"... les statistiques ne donnent pas une idée exacte de l'ampleur du problème. Le nombre des infractions relatives à l'exploitation de la prostitution d'autrui qui y est indiqué est évidemment plus élevé pour les pays où toutes les activités de ce genre sont punissables que pour les pays qui ne les punissent pas ou ne punissent que certaines formes d'exploitation. De plus, par suite de l'application rigoureuse des lois, le nombre des infractions signalées peut être plus élevé sans que les infractions ou tentatives d'infraction aient nécessairement été plus nombreuses" 19/.

Du reste, l'important n'est pas la dimension numérique du phénomène, mais la violation plus ou moins grave qu'il constitue des droits fondamentaux de la personne humaine. Cette violation est "massive et flagrante", au sens de la résolution 32/130 du 16 décembre 1977 de l'Assemblée générale; donc elle requiert de la communauté internationale, selon la même résolution, une attention "prioritaire".

45. Ce qui a été analysé dans les pages précédentes est le mécanisme général. Il faut bien en effet parler d'un mécanisme, puisqu'on constate un enchaînement de causes et d'effets. Le lecteur voudra bien adapter ce qui est dit à chaque situation nationale particulière, et transmettre, le situation régionale, à chaque situation nationale particulière, et transmettre, le cas échéant, ses observations au Secrétaire général des Nations Unies en même temps (s'il le désire) qu'au Rapporteur spécial.

46. Mais il serait vain d'avoir ainsi décrit, même avec exactitude, le phénomène prostitutionnel, si l'analyse n'était pas suivie de propositions pour l'action. Ce sera l'objet des chapitres II et III de ce rapport.

qui résulte de l'exploitation touristique de la prostitution. Au sentiment du Rapporteur spécial, le tourisme sexuel est de toute évidence la plus mauvaise image que les pays industrialisés puissent donner de leur développement. Avec le cinéma, la presse et la publicité érotiques, il peut provoquer, dans les pays moins développés où il sévit, des réactions hostiles au développement lui-même et un retour à des interdits moraux discriminatoires qui freineraient l'émancipation nécessaire de la femme.

40. L'encouragement apporté par le tourisme occidental à la prostitution des jeunes enfants a été mis en évidence par un enquêteur de l'Association Terre des hommes (Lausanne), M. Tim Bond. Celui-ci a fait en 1980, dans deux pays de l'Asie du Sud-Est, trois enquêtes qu'il a prolongées en Europe, où il a trouvé en vente publique des publications qui renseignent les pédophiles sur les possibilités qui s'ouvrent pour eux du côté des jeunes garçons de familles pauvres dans les grandes s'ouvrent pour eux du côté des jeunes garçons de familles pauvres dans les grandes villes du Sud-Est asiatique et d'Afrique. M. Abdelwhab Bouhdiba a évoqué ces faits dans son rapport précité pour la Sous-Commission de la lutte contre les mesures dans son rapport précité pour la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités (voir annexe II). Le FISE, dans son Forum d'idées, leur a donné une large publicité l\(\frac{1}{2}\).

D. Observations sur le premier chapitre

41. Pour éviter d'alourdir le texte de ce rapport, l'auteur n'a pas chaque fois cité, à l'appui des faits qu'il met en évidence, les sources auxquelles il a puisé. On trouvera ces sources dans la liste des organisations consultées (voir annexes IV et V), dans la bibliographie sommaire (annexe VI), qui elle-même renvoie à d'autres sources, dans les rapports de MM. Bouhdiba (annexe II) et Whitaker (annexe III), et dans la synthèse faite par le Centre pour les droits de l'homme (E/CM.4/Sub.2/1982/13 et additifs; voir annexe VI, 22 a)].

\$\frac{4}{2}\$. C'est délibérément que le Rapporteur s'est abstenu de traiter de la prostitution masculine adulte sous ses diverses formes : homosexuelle, hétérosexuelle, mixte (travestis). Il lui a paru en effet que le Conseil économique et social, qui a mis l'accent sur la traite des femmes et des enfants, n'attribuait pas à ces formes relativement récentes de la prostitution le même caractère d'urgence. En outre, le proxénétisme, qui nous occupe par priorité, y est, semble-t-il, beaucoup moins organisé. Cependant ce sujet complexe, qui conduit aussi à un examen médical, social et juridique des phénomènes de transsexualité, mérite une étude particulière, peut-être par une coopération entre l'Organisation mondiale de la santé, la Division du développement social et INTERPOL.

43. C'est délibérément, aussi, qu'on n'a pas examiné ici deux questions pourtant connexes : la vente de fillettes pour le service domestique, et le commerce des jeunes de des pour les adoptions internationales. La traite des jeunes domestiques a été dénoncée par M. Abdelwahab Bouhdiba (voir annexe II, par. 115 et long intéresse ici par ses conséquences éventuelles, car elle risque de conduire à l'exploitation sexuelle des enfants dans la famille de l'employeur, et plus tard à leur chute dans la prostitution. Dans son origine, toutefois, elle relève plutôt du programme que poursuit l'Organisation internationale du Travail contre le travail forcé des enfants. Quant au commerce des jeunes enfants pour contre le travail forcé des enfants. Quant au commerce des jeunes enfants pour

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fait souvent sous le couvert de prétendues agences matrimoniales ou d'offres d'emploi dans des tournées de spectacles. Elles citent des réseaux de proxénétisme approvisionnant Genève depuis Paris; la Suisse et la République fédérale d'Allemagne depuis Bangkok; Singapour depuis la Malaisie et les Philippines; l'Espagne à partir de la France, du Cap-Vert, d'Amérique du Sud et des Philippines réponses aussi précises des autres Etats, nous aurions une image très claire des réponses aussi précises des autres Etats, nous aurions une image très claire des méthodes et des itinéraires empruntés pour la traite des êtres humains. Nous méthodes et des itinéraires empruntés pour la traite des êtres humains. Nous pour intions en particulier vérifier et approfondir les informations de presse citées sud-américaines seraient envoyées d'Argentine à Melbourne, des jeunes femmes d'Hawaï et de Californie au Japon, et des Suédoises de Singapour en Extrême-Orient, d'Hawaï et de Californie au Japon, et des Suédoises de Singapour en Extrême-Orient,

dénoncé la déstructuration de la communauté locale et de la personnalité féminine ant les temmes et la Stratégie internationale du développement. Le Groupe a d'experts réuni à Vienne, sous les asupices du Service de la promotion de la femme, du tourisme. C'est ainsi que l'a située, au mois de septembre 1982, le Groupe jutérêt à situer cette question dans le cadre général des conséquences culturelles résistance locale ne s'est pas encore organisée? En tout état de cause, il γ a durable? Et qu'en est-il d'autres régions du monde, comme les Caraïbes, où la du tourisme sexuel organisé dans cette région; mais cette diminutions est-elle janvier 1983 à Bangkok. De toutes ces actions, il résulte une diminution sensible niveau gouvernemental à la réunion du programme de l'ANSEA pour les femmes, en document présenté par les Philippines dont les recommandations ont été examinées au discuté de la prostitution lors de sa réunion de juillet 1982 et était saisie d'un femmes 15/. Entin, la Onfédération asiatique des organisations féminines 16/ a les pays de l'ANSEA un mouvement du tiers monde contre l'exploitation des ou à l'arrivée de "charters du sexe" dans des aéroports; et il se constitue parmi concours d'organisations syndicales, des manifestations sont organisées au départ des femmes 14/ dans la République de Corée, au Japon et aux Philippines : avec le ces actions des Eglises, une action commune est menée par l'Association asiatique un code moral pour les touristes (rapport cité à l'annexe VI, 10), Parallèlement à internationale qui entend des témoignages de toutes les parties du monde et suggère oecuménique des Eglises a organisé, sur "l'Eglise et le tourisme", une conférence prostitution touristique. A Stockholm, au mois de novembre 1981, le Conseil oecuménique des Eglises, dénonce dans une "lettre ouverte aux chrétiens" la L'Eglise", réunie à Sheffield (Royaume-Uni) sous les auspices du Conseil internationale de théologiens sur "la communauté des hommes et des femmes dans relatives à la prostitution 13/. Au mois de juillet 1981, la consultation asiatiques (rapport cité à l'annexe VI, 15), a adopté huit recommandations Conférence chrétienne d'Asie et de la Fédération des conférences episcopales atelier international sur le tourisme, réuni sous le double patronage de la d'Asie, d'Afrique et des Caraïbes. Au mois de septembre 1980, à Manille, un partir des pays développés d'Amérique, d'Europe et d'Asie vers les pays de tourisme Plusieurs associations féminines et les Eglises ont dénoncé ce trafic, qui sévit à particulier se greffe sur un marché de prostitution existant et le développe. personne prostituée est comprise dans le prix du billet. Ce tourisme d'un genre par les voyages organisés ("sex tours"), où la rencontre du touriste avec une non pas la prostituée, mais temporairement le client. C'est le courant constitué 39. Plus voyante, donc plus facile à déceler, est cette autre filière qui déplace,

36. Il est aisè de tomber dans la prostitution. Il est très difficile d'en sortir. En effet, pour quitter librement un proxènète, il faut d'habitude lui payer une "amende" considérable, équivalant parfois au produit d'une année entière que prostitution. A-t-on le courage de le dénoncer à la police, ce qui est interdit par la loi du "milieu", alors on risque des représailles terribles : des mutilations ou même la mort. Les rares prostituées qui ne sont pas soumises à un mutilations ou même la mort. Les rares prostituées qui ne sont pas soumises à un mutilations et tant elles se sentent rejetées (et le sont souvent en fait) par la marquées, et tant elles se sentent rejetées (et le sont souvent en fait) par la société "normale" où elles voudraient se réinsérer. Il n'est pas excessit de dire société "normale" où elles voudraient se réinsérer. Il n'est pas excessit de dire que, pour réussit sa réinsertion, il faut à la prostituée un courage héroïque.

C. Des filières internationales

encore des jeunes filles encore mineures. très discrètes déplacent d'un pays à l'autre non seulement des femmes adultes, mais femmes pauvres vers les hommes riches dans toutes les directions. Ces fillières Sud (moins développé) vers le Nord (plus développé) : il y aurait plutôt trafic de internationale des femmes, et que le trafic est loin de se limiter à un courant du pays (si ce n'est ceux où l'économie est très planifiée) échappent à la traite D'après ces indications incomplètes, il semble que peu de régions, peu de cravailleurs migrants a aussi, parfois, servi de couverture à des fillières de retrouvées, peu de mois après, dans la prostitution. Le regroupement familial des vers l'Europe des réfugiés africains y a transplanté des femmes que l'on a voyageurs, d'un marché d'esclaves alimentant le Moyen-Orient. Depuis lors, l'exode orientale, ne mentionne pas l'existence, signalée dans cette région par des arabes. Le rapport, qui ne disposait pas d'informations en provenance d'Afrique certains pays plus riches d'Afrique occidentale; un marché régional des pays Acks te inxembourg et la République fédérale d'Allemagne; un courant d'Europe vers européen, partiellement alimenté par l'Amérique latine et exportant des Françaises Sud-Est vers le Moyen-Orient et l'Europe centrale et du Nord; un marché régional au-delà, vers l'Europe méridionale et le Moyen-Orient; un courant de l'Asie du internationales de traite : un courant d'Amérique latine vers Porto Rico et reçues des polices de 69 Etats, le rapport identifie plusieurs fillières dans son rapport (voir E/CN.4/Sub.2/1982/20, annexe III). D'après les informations femme (voir annexe VI, 2). Il a été partiellement cité par M. Benjamin Whitaker publié par Kathleen Barry en annexe à son livre intitulé L'esclavage sexuel de la à Buenos Aires un troisième rapport sur la traite des femmes. Ce rapport a été police criminelle de 134 Etats, a établi pour son Assemblée générale d'octobre 1975 économique et social des Nations Unies, et composée par les bureaux centraux de organisation intergouvernementale liée par un arrangement spécial au Conseil 37. L'Organisation internationale de police criminelle (OIPC ou INTERPOL),

38. Fort heureusement, les réponses adressées au questionnaire annuel établi par le Centre pour les droits de l'homme, bien qu'émanant d'une petite minorité d'Etats, apportent des indications complémentaires précises sur certains traiics infernationaux. Des réponses à la question 10 ont ainsi été fournies, pour la période 1979-1981, par trois seuls pays : l'Espagne, la France et Singapour. Ces réponses ont été résumées dans un rapport sur l'esclavage (voir annexe VI, 25), réponses ont été résumées dans un rapport sur l'esclavage (voir annexe VI, 25), l'esclavage pour sa huitième session (août 1982), Elles montrent que le trafic se l'esclavage pour sa huitième session (août 1982), Elles montrent que le trafic se l'esclavage pour sa huitième session (août 1982), Elles montrent que le trafic se

un bénéfice sur des rencontres où l'amour est pratiqué à titre vénal (certains mariages de complaisance internationaux ne sont conclus que pour la prostitution). Faut-il considérer encore comme proxénète l'éditeur du livre ou du journal qui encourage de telles pratiques? L'imagination humaine est infinie quand il y a un profit à prélèver.

32. Des services de renseignement et des firmes capitalistes se font proxénètes quand, pour corrompre ou compromettre un homme d'Etat ou un homme d'affaires, ils lui procurent, sous le nom d'hôtesses ou de secrétaires, des femmes entraînées à cette forme particulière de la prostitution de luxe.

négligence, peur ou corruption) de la part de la police ou du magistrat instructeur, ou que la preuve du délit soit parfois difficile à apporter (la victime renonçant devant le tribunal, par peur des représailles, aux accusations taites devant la police et le magistrat instructeur), ou que le proxénète soit procégé comme indicateur, ou encore que le délinquant échappe aux poursuites en procégé comme indicateur, ou encore que la répression est peu efficace. Dans l'Etat d'un proxénète qui estime être le plus répressif, la répression n'atteint du'un proxénète environ sur dix : l'effet dissuasif est très insuffisant.

B. Un esclavage

34. Si l'on récapitule les diverses causes collectives (lointaines) et individuelles (immédiates) de la prostitution - misère économique, misère affective, ruses et contraintes des proxénètes -, il n'est pas besoin d'expliquer par une quelconque débilité mentale ou par un prétendu goût du vice le fait que des femmes tombent dans l'état de prostituée.

mais toutes sont soumis au plus avilissant, au plus destructeur des esclavages. parfois sont infligées aux pensionnaires. Toutes ne sont pas torturées, certes, l'Année internationale de la femme de Mexico, avait signalé les tortures qui Directeur general de l'Unesco, par son porte-parole à la Conférence mondiale de Centre, est plus sévère encore que celui qui est subi sur le trottoir. Le maison close, même si elle est baptisée bain turc, sauna, salon de massage ou Eros dominée, d'exploiteur à exploitée, de maître à esclave. L'enfermement dans une défaut dans son enfance. Cela n'empêche que la relation est celle de dominant à trouve dans cet homme pourtant brutal à la fois le mari et le père qui lui a fait comme "mon mari" ou "mon homme", existe un rapport ambigu : il se peut que la femme marchandise. Entre la prostituée et son proxénète, qu'en Occident elle désigne un proxénète à un autre, comme autrefois un esclave et comme aujourd'hui une nom; mais de leur identité même. Du reste, il arrive qu'une femme soit vendue par effes peuvent le juger avec recul, qu'elles y étaient privées non seulement de leur communauté d'une secte. Celles qui ont pu sortir de ce milieu constatent, quand et psychologiquement conditionnées comme on peut l'être quand on vit dans la (rare) alterne savamment avec la puniton, elles se trouvent aussitôt marginalisées, légale, soumises par le proxénète à un dressage très efficace où la récompense morale et de la loi du "milieu", qui ne sont ni la morale ni la loi de la société enseignées par les "anciennes", exposées à la pression sans concurrence de la obligées, pour exercer leur nouvelle activité, de se conformer aux règles 35. Y étant entrées, elles y trouvent la servitude. Privées de toute autonomie,

policiers, le "fond de roulement" du grand banditisme. Cette trésorerie est assez abondante pour pouvoir corrompre, quand il sont corruptibles, les milieux politiques, la police et d'autres personnels de l'Etat.

28. La naïveté de la jeunesse facilite la tâche des recruteurs et des souteneurs, qui utilisent plus d'une ruse pour s'asservir leur victime, sans avoir toujours besoin de recourir à la contrainte. Le proxénète, qui n'a guère autre chose à faire, est habile à déceler les faiblesses de ses futures victimes. Les ruses les plus fréquentes sont tantôt la séduction et la promesse frauduleuse de mariage ou d'étalissement dans un emploi lucratif, suivies de l'exigence d'une prostitution d'étalissement dans une entistique à l'étranger, tournée aboutissant à une maison offert dans une tournée artistique à l'étranger, tournée aboutissant à une maison prostitution; tantôt même l'offre de restauration ou de prostitution; tantôt même l'offre de restauration ou de prostitution; tantôt même l'offre de séjours à l'étranger comme étudiantes dans des centres d'apprentissage de la langue. Quant aux contraintes, ce sont la drogue, qui facilite l'enlèvement et la séquestration, les contraintes, ce sont la drogue, qui facilite l'enlèvement et la séquestration, les mensces de morialation ou de meurile de serve menaces sont d'autant plus redoutables que l'on sait qu'elles sont particis suivies d'effet.

29. D'autres ruses, d'autres contraintes s'exercent sur les enfants. Sans doute, dans les ceintures de misère de certaines grandes villes, les enfants n'ont-ils parfois d'autre choix, pour survivre, que de prélever sur les ordures ménagères, mendier, voler ou se prostituer. Mais l'adulte - pédophile ou entremetteur - prend défavorisées, où les familles paysannes, sans défense, sont lourdement endettées vis-à-vis d'un usurier, les enfants sont parfois achetés ou loués par un entremetteur à ses parents, conscients sont parfois achetés ou loués par un entremetteur à ses parents, conscients sont parfois achetés de ses parents l'enfant est orphelin, abandonné, fugueur ou temporairement séparé de ses parents par quelque catastrophe, il est particulièrement vulnérable, et peut être tout simplement enlevé. Le tourisme des pédophiles intervient ici (voir par. 40).

30. Dans certains pays industrialisés, la prostitution enfantine a été récemment organisée au profit de l'industrie pornographique, qui comporte albums de photos, films et vidéo-cassettes. Les enfants sont alors photographiés ou filmés dans des positions impudiques, et ces images sont vendues fort cher au sein d'un réseau clandestin d'amateurs. Ce commerce peut être national ou international.

31. Le proxénétisme ne se limite pas aux fonctions de recruteur, d'entremetteur et de souteneur. De nombreuses législations considèrent et poursuivent comme proxénète quiconque s'enrichit consciemment par la prostitution d'autrui. C'est le cas du propriétaire ou du'locataire qui met, moyennant une rétribution supérieure au cours moyen des loyers, un local à la dispositon d'une prostituée pour s'y livrer à ses activités : d'où les délits de "proxénétisme hôtelier" et de "proxénétisme immobilier". Proxénète aussi, bien que rarement poursuivi, est le proxénète ou gérant d'un bar où les serveuses sont invitées à se prostituer. Proxénète encore, bien que jamais poursuivi jusqu'à présent, est l'organisateur de voyages touristiques ("sex charters") où la rencontre avec une prostituée est comprise dans le prix du tour. Devrait aussi être considére comme proxénète le comprise dans le prix du tour. Devrait aussi être considére comme proxénète le comprise dans le prix du tour. Devrait aussi être considére comme proxénète le comprise dans le prix du tour. Devrait aussi être considére comme proxénète le colub de rencontres ou l'agence dite "matrimoniale", quand cette entreprise perçoit colub de rencontres ou l'agence dite "matrimoniale", quand cette entreprise perçoit

situation familiale de viol ou de violence (ce qui est très souvent le cas des prostituées très jeunes) ou par un proxénète, nous ne ferions pas 'la vie' si nous étions en mesure de nous retirer" $\underline{11}$.

24. L'exode rural, dans les pays en développement, apparaît comme une cause déterminante de la prostitution. Une enquête publiée en 1978 par la revue Famille et Développement, de Dakar (voir annexe VI, 14), constate qu'en ville les emplois sont dirigés essentiellement vers les hommes. Aussi les premières victimes de la ville sont-elles les femmes. A la campagne elles avaient un rôle de producteur; en ville elles ne garderont que celui de mère et d'épouse. Souvent analphabètes, sans qualification professionnelle, elles ont peu d'alternatives : être manoeuvre dans qualification professionnelle, elles ont peu d'alternatives : être manoeuvre dans commerce ou se prostituer. Cette dernière option s'est imposée à beaucoup de femmes, depuis quelques années, comme une condition de survie pour elles et leurs enfants. Il faut ajouter que l'offre de prostitution s'est développée sous enfants. Il faut ajouter que l'offre de prostitution s'est développée sous l'influence du tourisme de masse (voir par. 39).

25. L'émigration, qui est souvent un prolongement de l'exode rural, produit des effets comparables. Les femmes immigrées, souligne le même document (voir par. 23) remis à Nice par trois "collectifs", sont les personnes les plus vulnérables à l'exploitation.

"Des femmes qui ont été violées, battues, forcées de travailler par un souteneur (qu'il s'agisse d'une prostituée qui travaille pour un proxénète ou d'une domestique qui travaille pour une famille), ou pour un salaire illégal au marché noir, ont trop peur d'être déportées pour oser porter plainte à la police" LV.

D'autres observations sur les conséquences que les migrations de travailleurs comportent pour la prostitution seront faites au paragraphe 80.

26. Partout où il y a présence massive de troupes étrangères, on constate, dans le pays même et dans les pays voisins où les militaires se rendent en congé, l'apparition d'un marché de la prostitution ou l'amplification du marché existant. Des habitudes se créent parmi la population féminine, habitudes qui, après le retrait des troupes ou des bases, seront exploitées par des circuits touristiques qui prendront le relais. Pour une organisation de femmes asiatiques, c'est une raison supplémentaire de lutter contre les alliances militaires et l'utilisation tais preparative de lutter contre les alliances militaires et l'utilisation pre pays pour la préparation d'une nouvelle querre mondiale.

27. Une prostitution occasionnelle, dite "de fin de mois", se transforme en prostitution permanente dès que la femme tombe sous l'autorité d'un proxénète. Celui-ci est un personnage plus souvent évoqué par la littérature ou par le cinéma qu'il n'est connu par les travailleurs sociaux. En revanche, il est bien connu des policiers, qui l'utilisent parfois (trop souvent!) comme indicateur. Mépris de la femme, paresse congénitale et manque total de moralité sont les caractères qui prédisposent un homme à se faire proxénète. Recruteur, il "vend" la femme à une prédisposent un nomme à se faire proxénète. Recruteur, il "vend" la femme à une journaliers. Les uns et les autres font partie du milieu du crime. Les sommes considérables que rapporte le proxénétisme constituent en effet, observent les considérables que rapporte le proxénétisme constituent en effet, observent les considérables que rapporte le proxénétisme constituent en effet, observent les

Des trois partenaires de la relation triangulaire - client, prostituée, proxènète -, le premier est le plus mal connu. Aucune législation, aucune réglementation ne punissant ni ne contrôlant le client, celui-ci peut garder son anonymat. Dans aucune littérature, jusqu'à présent, à la connaissance du Rapporteur, le client n'a dévoilé lui-même ses motivations 9/. L'analyse de ce qui pousse l'homme célibataire ou marié à devenir client reste donc à faire. En attendant, on peut seulement supposer que ses désirs et sa conduite dérivent de l'image que la société lui donne de sa virilité et de l'idée qu'il se fait du devoir qu'a la femme de servir son plaisir. Le service militaire et les médias devoir qu'a la femme de servir son plaisir. Le service militaire et les médias jouent sans doute ici un rôle déterminant. Une insuffisante préparation de la femme, mais aussi de l'homme, au mariage pourrait expliquer certains échecs du couple, qui conduisent le mari à chercher des satisfactions sexuelles hors de son toyer.

plus grande, marginalisation. pourrait dire que, partant d'une situation marginale, elles ont abouti à une autre, quand on est intoxique 10/. En bref, de la plupart des femmes prostituées on que la prostitution apparaisse comme le seul moyen de se procurer de la drogue elle se suiciderait : par chagrin, solitude, ennui ou désespoir. Enfin il arrive prostitution comme elle tomberait dans l'alcoolisme ou dans la drogue, ou comme simplement, et dans tous les milieux sociaux, une femme peut tomber dans la d'une personnalité qui ne parvient pas à s'imposer à son entourage? Plus besoin plus profond de combler par des signes extérieurs de richesse la frustration des satisfactions qu'il procure. Mais ce besoin d'argent ne traduit-il pas le fois un défi lance à la morale conventionnelle et un goût démesuré de l'argent et rares où la prostituée vient d'une famille aisée, on trouve dans sa motivation à la Prostitutes - et elles sont très attachées à leur enfant). Dans les cas assez elles, les mères célibataires - 70 p. 100 selon l'English Collective of l'enfant qu'elles ont eu d'un homme qui les a abandonnées (nombreuses sont, parmi ou inceste. Aussi ne comptent-elles pas sur leur famille si elles veulent élever prostituées ont grandi dans des familles divisées; un grand nombre y ont subi viol le refus d'y recourir quand elle est disponible. Statistiquement, la plupart des abandon per un mari ou par un amant), et l'absence d'une assistance extérieure ou moral, une frustration affective (rejet des parents ou rejet par les parents, prostituent pas; il faut qu'à la misère se joignent un effacement de l'interdit principal, mais n'est pas une cause suffisante : toutes les femmes misérables ne se qu'une femme en vient à se prostituer. La misère économique est le point de départ qu'elles ont vécu dans la prostitution. On sait donc aujourd'hui ce qui fait plusieurs anciennes prostituées ont rapporté dans des récits autobiographiques ce sociaux et a été souvent décrite dans la littérature. De plus, de nos jours, 22. La prostituée est mieux connue, parce qu'elle est suivie par les travailleurs

23. De toute manière, même quand la prostitution apparaît comme le résultat d'un libre choix, elle est en réalité forcée. Tel est le témoignage donné au Congrès de Nice, le 8 septembre 1981, par trois "collectifs" de femmes prostituées de deux grands pays développés:

En tant que prostituées, nous savons bien que <u>toute</u> prostitution est une prostitution forcée. Que nous soyons forcées de nous prostituer pour une pénurie d'argent, des problèmes de logement, de chômage, pour échapper à une

Chapitre I

UNE QUESTION UNIVERSELLE ET INTERDISCIPLINAIRE

16. Contrairement à une opinion trop répandue, la prostitution n'est pas le vieux métier du monde. Beaucoup de sociétés dites "primitives" l'ont ignorée et l'ignorent encore. Mais il est vrai qu'elle se rencontre aujourd'hui, à des degrés divers, dans tous les Etats organisés, dans toutes les cultures et sous toutes les latitudes, surtout là où il y a à la fois grande densité de population et abondance d'échanges monétaires.

17. On peut, pour l'étudier, l'approcher sous plusieurs angles (et c'est pourquoi, nous le verrons, elle intéresse des organisations à vocations très diverses) : sous celui de l'ethnologie, de la sociologie ou de l'histoire de la culture, par exemple. On peu encore, du point de vue de l'économie politique, observer le milieu de la prostitution comme un système économique fermé; ou, du point de vue de la criminologie, comme étant, par le proxénétisme qui y sévit, une branche du milieu du crime. On peut encore juger de la prostitution au nom de l'hygiène sociale, de la religion ou de la morale. Pour nous, sans ignorer aucune de ces approches, nous nous plaçons, comme le Conseil économique et social, du point de vue des droits de l'homme, et de ce point de vue, comme la Commission des droits de l'homme, nous considérons la prostitution comme un esclavage.

A. Un commerce triangulaire

18. Comme l'esclavage au sens habituel, la prostitution a un aspect économique. En même temps qu'un phénomène culturel ayant sa racine dans les images de l'homme et de la femme véhiculées par la société, elle est un marché, et un marché fort lucratif. La marchandise est ici le plaisir de l'homme, ou l'imagination du plaisir. Cette marchandise est malheureusement offerte par l'intimité du corps de la femme ou de l'enfant. Aussi l'aliénation de la personne est-elle ici plus grave que dans l'esclavage au sens habituel, où ce qui est aliéné est la force de travail, non l'intimité.

19. Le marché est ouvert par une demande, à laquelle répond une offre. La demande vient du client, que l'on pourrait aussi appeler "prostituant". L'offre est faite par la prostituée. C'est le cas simple, mais le plus rare. Dans la plupart des cas (huit ou neuf sur dix, selon les observateurs, tout au moins en Europe) intervient un troisième personnage, le plus important peut-être: c'est l'organisateur et exploiteur du marché, autrement dit le proxénète sous ses diverses formes: entremetteur du marché, autrement dit le proxénète sous ses diverses formes: entremetteur un recruteur, souteneur, propriétaire de maison diverses formes : entremetteur du marché, autrement dit le proxénète sous ses diverses formes : entremetteur du necruteur, souteneur, propriétaire de maison studio. Le proxénète est le plus souvent un professionnel, plus ou moins intégré dans le milieu du crime. Au niveau des enfants, ce peut être un enfant plus âgé, dans pratique le "racket".

20. Dans les Etats industrialisés à économie de marché, le souci de ne pas entraver le commerce permet que se développe, à côté du marché discret de la prostitution, le marché non dissimulé de l'érotisme et de la pornographie. Ces deux marchés se complètent et s'entraident : les rues où se trouvent les "sex-shops" sont celles où se pratique le plus la prostitution.

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SCTIVITES DESTINEES A LA PROMOTION DE LA FEMME : DECENNIE DES NATIONS UNIES

Rapport de M. Jean Fernand-Laurent, Rapporteur spécial, sur la répression et l'abolition de la traite des êtres humains et de l'exploitation de la prostitution d'autrui

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œuvre à l'école et dans les médias, concernant l'image de la femme dans la société:

12. Invite Porganisation mondiale du tourisme à inscrire la question du tourisme sexuel à l'ordre du jour de ses travaux:

13. Prie le Secrétaire général de prendre les mesures nécessaires pour que le rapport établi par le Rapporteur spécial en application de la résolution 1982/20 du Conseil soit reproduit en tant que publication des Nations Unies, de manière à ce qu'il bénéficie d'une large diffusion;

14. Prie également le Secrétaire général de faire rapport au Conseil économique et social, lors de sa première session ordinaire de 1985, sur les mesures prises pour donner suite à la présente résolution;

15. Dévide que les activités recommandées dans la présente résolution seront menées dans la limite des ressources prévues par le Secrétaire général dans le projet de budget-programme pour l'exercice biennal 1984-1985.

94° séance plénière 5891 inni 25

Question de la jouissance effective, dans tous les pays, de droits économiques, sociaux et culturels proclamés par la Déclaration universelle des droits de l'homme et par le Pacte international relatif aux droits économiques, sociaux et culturels, et étude des problèmes particuliers que rencontrent les pays en développement dans leurs efforts tendant à la la réalisation des droits de l'homme

Le Conseil économique et social,

°15/E861

Ruppelunt sa résolution 1929 (LVIII) du 6 mai 1975, dans laquelle il notait que, si l'on veut que la participation populaire soit efficace, les gouvernements doivent la promouvoir de façon consciente, en tenant pleinement compte des droits civils, politiques, sociaux et culturels, au moyen de mesures novatrices, y compet des droits civils, politiques, sociaux et culturels, au moyen de astructure et la réforme et le développement des institutions, ainsi qu'en encourageant toutes les formes d'éducation en vue d'assurer le concours actif de tous les secteurs de la société, le concours actif de tous les secteurs de la société,

Rappelant en outre les résolutions 32/130, 34/46 et 37/55 de l'Assemblée générale, en date des 16 décembre 1977, 23 novembre 1979 et 3 décembre 1982,

I. Prie le Secrétaire général d'effectuer une étude analytique complète sur le droit à la participation populaire sous diverses formes, en tant que facteur important de la pleine réalisation de tous les droits de l'homme, et de présenter une étude preliminaire à la Commission des droits de l'homme à sa quarantième session et l'étude finale à sa quarantième session et l'étude finale à sa quarantième

2. Pric en outre le Secrétaire général de tenir compte pour cette étude des travaux sur le principe et la praticipation populaire qui ont été tait par les organes de l'Organisation des Nations Dnies, les institutions spécialisées et d'autres organismes compétents du système, ainsi que des vues exprimés compétents du système, ainsi que des vues exprimés à la trente-neuvième session de la Commission des droits de l'homme et des vues, notamment sur les des droits de l'homme et des vues, notamment sur les

e) Répriner d'une manière dissussive le proxènetisme sous toutes ses formes, surrout quand il exploite

f) Facilitet la formation professionnelle et la réinsertion sociale des personnes sauvées de la prosti-

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des réseaux internationaux de proxénètes, à collaborer étroitement entre eux et, s'ils en sont membres, avec l'Organisation internationale de police criminelle, en demandant à cette organisation de faire de la lutte contre la traite des êtres humains une de ses priorités; 5. Invite les commissions régionales à prêter leur

5. Invite les commissions régionales à preter leur concours aux Etats Membres et aux organismes des Nations, séminaires ou colloques régionaux d'experts sur la traite des êtres humains;

6. Suggère au Secrétaire général de désigner comme point focal le Centre pour les droits de l'homme, et plus précisément le secrétariat du Groupe de travail sur l'esclavage, en liaison étroite avec le Centre pour le développement social et les affaires humanitaires du Département des affaires économiques et sociales internationales;

7. Prie la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités d'examiner la possibilité d'inviter la Commission de la condition de la femme à désigner un représentant pour participer à toutes les sessions du Groupe de travail sur l'esclavage, en conformité avec la résolution 48 (IV) du Conseil économique et social, en date du 29 mars 1947;

8. Prie le Centre pour les droits de l'homme d'établir, en lisison avec les institutions et les organes des Mations Unies concernés et avec les organisations non gouvernementales compétentes, deux études complémentaires : l'une sur les ventes d'enfants, l'autre sur les problèmes juridiques et sociaux des minorités sexuelles, y compris la prostitution masculine, et de les présenter dès que possible à la Sous-Commission de la présenter dès que possible à la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités:

9. Encourage le Centre du développement social et des affaires humanitaires de la Division des affaires économiques et sociales internationales à utiliser les moyens disponibles de ses diverses branches, en vue d'entreprendre des études interdisciplinaires, et à coopérer avec la Division des stupéfiants;

10. Invite tous les organes, organisations et organisations et organismes intéressés du système des Nations Unies, et en particulier le Fonds des Nations Unies pour l'enfance, le Haut Commissariat des Nations Unies pour les réfugiés. l'Organisation internationale du Travail et l'Organisation mondiale de la santé, à appeler sur la traite des êtres humains l'attention de leurs représentants et experts et à transmettre leurs observations et leurs études au point focal désigné par le Secrétaire et leurs études au point focal désigné par le Secrétaire général;

11. Encourage l'Organisation des Mations-Unies pour l'éducation, la science et la culture à élaborer avec les Etats membres des programmes, à mettre en

4. Souligne que le programme de travail de l'Institut pour l'exercice biennal 1984-1985 devrait continuer à être axé sur les efforts de recherche, formation et information qui conduisent à l'intégration des femmes aux grandes activités de développement;

5. Réaffirme qu'il est nécessaire que les commissions régionales, les institutions spécialisées et les autres organismes des Nations Unies appuient l'Institut et entretiennent avec lui une étroite coopération;

6. Demande à tous les Etats Membres de contribuer au Fonds d'affectation spéciale des Nations Unies pour l'Institut international de recherche et de formation pour la promotion de la femme et d'assurer le financement régulier et efficace de son progrès et de son développement.

14° séance plénière

1983/30. Lutte contre la traite des êtres humains et l'exploitation de la prostitution d'autrui

Le Conseil économique et social,

Ruppelunt que l'esclavage des femmes et des enfants soumis à la prostitution est incompatible avec la dignité de la personne humaine et avec ses droits fondamentains

Ruppelant sa résolution 1982/20 du 4 mai 1982.

Ayant pris connaissance du rapport établi par le Rapporteur spécial en application de cette résolution⁶¹,

I. Invite de nouveau les Etats Membres à signer, ratifier et mettre en application la Convention relative à la répression de la traite des êtres humains et de l'exploitation de la prostitution d'autrui⁶²;

2. Invite également les Etats Membres à signer, raidfier et mettre en application la Convention internationale pour la répression de la circulation et du traffe des publications obscènes, conclue à Genève le 12 septembre 1923, amendée par le Protocole signé à Lake Success, New York, le 12 novembre 194763;

3. Recommande aux Etats Membres de tenir compte du rapport du Rapporteur spécial pour élaborer, sous réserve de leur constitution et de leur législation et en consultation avec les parties intéressées, des politiques tendant, autant que possible, à :

 a) Prévenir la prostitution par l'éducation morale et la formation civique, à l'école et en dehors de l'école;

b) Augmenter le nombre des femmes parmi les agents de l'Etat qui sont en contact direct avec les

c) Eliminer les discriminations qui marginalisent les prostituées et rendent leur reinsertion

sociale plus difficile;

(b) Freiner l'industrie et le commerce de la porno-

graphie et les réprimer très sévèrement quand des mineurs s'y trouvent impliqués;

tatif auprès du Conseil économique et social interessées à participer activement aux préparatifs et aux travaux de la Conférence mondiale chargée d'examiner et d'évaluer les résultats de la Décennie des Nations Unies pour la femme, qui doit avoir lieu en 1985;

2. Prie également le Secrétaire général d'inviter les organisations non gouvernementales dotées du statut consultatif auprès du Conseil économique et social inféressées à communiquer des informations à la Commission de la condition de la femme constituée en organe préparatoire de la Conférence mondiale de 1985, et notamment à lui faire connaître leurs vues sur les progrès accomplis dans la réalisation des objecture les progrès accomplis dans la réalisation des objecture de la Décennie et les obstacles qui restent à surtifs de la Décennie et les obstacles qui restent à sur monter pour les atteindre, ainsi que leurs vues sur les progrès et les stratégies à l'horizon 2000;

3. Prie instamment les gouvernements d'inviter les organisations non gouvernementales intéressées de leurs pays respectifs à faire également connaître leurs vues sur les progrès réalisés au niveau national, les obstacles qui restent à surmonter et les objectifs à atteindre, ainsi qu'à collaborer à l'établissement des rapports nationaux qu'ils présenteront au Secrétaire général;

4. Prie les commissions régionales de faire en sorte que les organisations non gouvernementales dotées du statut consultatif auprès du Conseil économique et social intéressées participent aux préparatifs et aux travaux des réunions préparatoires intergouvernementales régionales qui seront organisées dans leurs régions respectives en vue de la Conférence mondiale régions respectives en vue de la Conférence mondiale

14° séance plénière 26 mai 1983

1983/29. Institut international de recherche et de formation pour la promotion de la femme

Le Conseil économique et social,

Ruppelant sa résolution 1982/27 du 4 mai 1982, relative à l'Institut international de recherche et de formation pour la promotion de la femme,

Ayanı a l'esprit les objectifs de la Décennie des Nations Unies pour la femme : égalité, développement et paix,

Ayant examiné le rapport du Conseil d'administration de l'institut international de recherche et de formation pour la promotion de la femme sur les travaux de sa troisième session⁵⁹,

1. Exprime sa satisfaction devant les travaux déjà accomplis dans le cadre du programme de travail de l'Institut international de recherche et de formation pour la promotion de la femme;

2. Prend note des décisions et recommandations adoptées par le Conseil d'administration à sa troisseme session⁶⁰;

3. Note avec satisfaction l'achèvement de la première phase du programme de statistiques et d'indicateurs sur la situation des femmes ainsi que le lancement des programmes de formation et de bourses de ment des programmes de formation et de bourses de

so E/1983/31, 60 Ibid., sect. I.

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⁶¹ E/1983/7-et Cont.1 et 2 en 2 de l'Assemblée générale, en date du 2 décembre 1949, annexe. 61 Mations Unies, Recueil des Truités, vol. 46, nº 710, p. 201.

2. Pour chacun des Etats qui ratifieront la présente Convention ou y adhéreront après le dépôt du vingtième instrument de ratification ou d'adhésion, ladite Convention entrera en vigueur le trentième jour après la date du dépôt par cet Etat de son instrument de ratification ou d'adhésion.

Article 28

1. Le Secrétaire général de l'Organisation des Nations Unies recevra et communiquera à tous les Etats le texte des réserves qui auront été faites au moment de la ratification ou de l'adhésion.

S. Aucune reserve incompatible avec l'objet et le but de la présente Convention ne sera autorisée.

3. Les réserves peuvent être retirées à tout moment par voie de notification adressée au Secrétaire général de l'Organisation des Nations Unies, lequel informe tous les Etats parties à la Convention. La notification prendra effet à la date de réception.

Article 29

I. Tout différend entre deux ou plusieurs Etats parties concernant l'interprétation ou l'application de la présente Convention qui n'est pas réglé par voie de négociation est soumis à l'arbitrage, à la demande de l'un d'entre eux. Si, dans les six mois qui suivent la date de la demande d'arbitrage, les parties ne parviennent pas à se mettre d'accord sur l'organisation de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de quelconque d'entre elles peut soumettre le différend à la Cour internationale de l'arbitrage, l'une quelconque d'entre elles peut soumettre le différend à la Cour internationale de l'arbitrage, en déposant une requête conformément au Statut de la Cour.

2. Tout Etat partie pourra, au moment où il signera la présente Convention, la ratifiera ou y adhérera, déclarer qu'il ne se considère pas lié par les dispositions du paragraphe I du présent article. Les autres Etats parties ne seront pas liés par lesdites dispositions envers un Etat partie qui aura formulé une telle réserve.

3. Tout Etat partie qui aura formulé une réserve conformément aux dispositions du paragraphe 2 du présent article pourra à tout moment lever cette réserve par une notification adressée au Secrétaire général de l'Organisation des Nations Unies.

Article 30

La présente Convention, dont les textes en anglais, arabe, chinois, espagnol, français et russe font également foi, sera déposée auprès du Secrétaire général de l'Organisation des Nations Unies.

EN FOI DE QUOI les soussignés, à ce dûment habilités, ont signé la présente Convention.

Article 22

Les institutions spécialisées ont le droit d'être représentées lors de l'examen de la mise en oeuvre de toute disposition de la présente Convention qui entre sées à soumettre des rapports sur l'application de la Convention dans les domaines qui entrent dans le cadre de leurs activitées.

SIXIEME PARTIE

Article 23

Aucune des dispositions de la présente Convention ne portera atteinte aux dispositions plus propices à la réalisation de l'égalité entre l'homme et la femme pouvant être contenues:

- a) Dans la législation d'un Etat partie, ou
- b) Dans toute autre convention, tout autre traité ou accord international en vigueur dans cet Etat.

Article 24

Les Etats parties s'engagent à adopter toutes les mesures nécessaires au niveau national, pour assurer le plein exercice des droits reconnus par la présente Convention.

Article 25

- 1. La présente Convention est ouverte à la signature de tous les Etats.
- 2. Le Secrétaire général de l'Organisation des Nations Unies est désigné comme dépositaire de la présente Convention.
- 3. La présente Convention est sujette à ratification et les instruments de ratification seront déposés auprès du Secrétaire général de l'Organisation des Nations Unies.
- 4. La présente Convention sera ouverte à l'adhésion de tous les Etats. L'adhésion s'effectuera par le dépôt d'un instrument d'adhésion auprès du Secrétaire général de l'Organisation des Nations Unies.

Article 26

- 1. Tout Etat partie peut demander à tout moment la révision de la présente Convention en adressant une communication écrite à cet effet au Secrétaire général de l'Organisation des Nations Unies.
- 2. L'Assemblée générale des Nations Unies décide des mesures à prendre, le cas échéant, au sujet d'une demande de cette nature.

Article 27

1. La présente Convention entrera en vigueur le trentième jour qui suivra la date du dépôt auprès du Secrétaire général de l'Organisation des Nations Unies du vingtième instrument de ratification ou d'adhésion.

a) Les membres du Comité reçoivent, avec l'approbation de l'Assemblée générale, des émoluments prélevés sur les ressources de l'Organisation des Nations Unies dans les conditions fixées par l'Assemblée eu égard à l'importance

des fonctions du Comite.

b) Le Secrétaire général de l'Organisation des Nations Unies met à la disposition du Comité le personnel et les moyens matériels qui lui sont nécessaires pour s'acquitter efficacement des fonctions qui lui sont confiées en nécessaires pour s'acquitter efficacement des fonctions qui lui sont confiées en

Article 18

1. Les Etats parties s'engagent à présenter au Secrétaire général de l'Organisation des Nations Unies, pour examen par le Comité, un rapport sur les mesures d'ordre législatif, judiciaire, administratif ou autre qu'ils ont adoptées pour donner effet aux dispositions de la présente Convention et sur les progrès réalisés à cet égard:

a) Dans l'année suivant l'entrée en vigueur de la Convention dans l'Etat intéressé;

b) Puis tous les quatre ans, ainsi qu'à la demande du Comité.

2. Les rapports peuvent indiquer les facteurs et difficultés influant sur la mesure dans laquelle sont remplies les obligations prévues par la présente Convention.

Article 19

1. Le Comité adopte son propre règlement intérieur.

vertu de la présente Convention.

2. Le Comité élit son Bureau pour une période de deux ans.

Article 20

1. Le Comité se réunit normalement pendant une période de deux semaines au plus chaque année pour examiner les rapports présentés conformément à l'article 18 de la présente Convention.

2. Les séances du Comité se tiennent normalement au Siège de l'Organisation des Nations Unies ou en tout autre lieu adéquat déterminé par le Comité.

Article 21

1. Le Comité rend compte chaque année à l'Assemblée générale des Nations Unies, par l'intermédiaire du Conseil économique et social des Nations Unies, de ses activités et peut formuler des suggestions et des recommandations générales fondées sur l'examen des rapports et des renseignements reçus des Etats parties. Ces suggestions et recommandations sont incluses dans le rapport du Comité, accompagnées, le cas échéant, des observations des Etats parties.

2. Le Secrétaire général transmet les rapports du Comité à la Commission de la condition de la femme, pour information.

2. Les fiançailles et les mariages d'enfants n'auront pas d'effets juridiques et toutes les mesures nécessaires, y compris des dispositions législatives, seront prises afin de fixer un âge minimum pour le mariage et de rendre obligatoire l'inscription du mariage sur un registre officiels.

CINQUIEME PARTIE

Article 17

L'égardion, il est constitué un Comité pour l'élimination de la présente l'égardion, il est constitué un Comité pour l'élimination de la discrimination à l'égard des femmes (ci-après dénommé le Comité) qui se compose, au moment de l'archée en vigueur de la Convention, de dix-huit, et après sa ratification ou l'antrée en vigueur de la Convention, de dix-huit, et après sa ratification baute autorité morale et éminemment compétents dans le domaine auquel s'applique la présente Convention, élus par les États parties parmi leurs ressortissants et siègeant à titre personnel, compte tenu du principe d'une répartition géographique équirable et de la représentation des différentes formes de civilisation ainsi que équirable et de la représentation des différentes formes de civilisation ainsi que des principaux systèmes juridiques.

2. Les membres du Comité sont élus au scrutin secret sur une liste de candidats désignés par les Etats parties. Chaque Etat partie peut désigner un candidat choisi parmi ses ressortissants;

3. La première élection a lieu six mois après la date d'entrée en vigueur de la présente Convention. Trois mois au moins avant la date de chaque election, le Secrétaire générale de l'Organisation des Nations Unies adresse une lettre aux Etats parties pour les inviter à soumettre leurs candidatures dans un délai de deux mois. Le Secrétaire général dresse une liste alphabétique de tous les candidats, en indiquant par quel Etat ils ont été désignés, liste qu'il communique aux Etats parties;

4. Les membres du Comité sont élus au cours d'une réunion des Etats parties convoquée par le Secrétaire général au Siège de l'Organisation des Nations Unies. A cette réunion où le quorum est constitué par les deux tiers des Etats parties, sont élus membres du Comité les candidats ayant obtenu le plus grand nombre de sont el la majorité absolue des votes des représentants des Etats parties présents parties présents.

5. Les membres du Comité sont élus pour quatre ans. Toutefois, le mandat de neut des membres élus à la prémière élection prendra fin au bout de deux ans, le Président du Comité tirera au sort les noms de ces neuf membres immédiatement après la première élection;

6. L'élection des cinq membres additionnels du Comité se fera conformément aux dispositions des paragraphes 2, 3 et 4 du présent article à la suite de la trente-cinquième ratification ou adhésion. Le mandat de deux des membres additionnels élus à cette occasion prendra fin au bout de deux ans, le nom de ces deux membres sera tiré au sort par le Président du Comité;

7. Pour remplir les vacances fortuites, l'Etat partie dont l'expert a cessé d'exercer ses fonctions de membre de Comité nommera un autre expert parmi ses ressortissants, sous réserve de l'approbation du Comité.

QUATRIEME PARTIE

Article 15

 Les Etats parties reconnaissent à la femme l'égalité avec l'homme devant la loi.

2. Les Etats parties reconnaissent à la femme, en matière civile, une capacité juridique identique à celle de l'homme et les mêmes possibilités pour exercer cette capacité. Ils lui reconnaissent en particulier des droits égaux en ce qui concerne la conclusion de contrats et l'administration des biens, et leur accordent le même traitement à tous les stades de la procédure judiciaire,

3. Les Etats parties conviennent que tout contrat et tout autre instrument privé, de quelque type que ce soit, ayant un etfet juridique visant à limiter la capacité juridique de la femme, doit être considéré comme nul.

 ψ_{\star} . Les Etats parties reconnaissent à l'homme et à la femme les mêmes droits en ce qui concerne la législation relative au droit des personnes à circuler librement et à choisir leur résidence et leur domicile.

Article 16

1. Les Etats parties prennent toutes les mesures nécessaires pour éliminer la discrimination à l'égard des femmes dans toutes les questions découlant du mariage et dans les rapports familiaux et, en particulier, assure, dans des conditions d'égalité avec les hommes:

- a) Le même droit de contracter mariage;
- b) Le même droit de choisir librement son conjoint et de ne contracter mariage que de son libre et plein consentement;
- c) Les mêmes droits et les mêmes responsabilités au cours du mariage et lors de sa dissolution;
- d) Les mêmes droits et les mêmes responsabilités en tant que parents, quel que soit leur état matrimonial, pour les questions se rapportant à leurs enfants. Dans tous les cas, l'intérêt des enfants sera la considération primordiale;
- e) Les mêmes droits de décider librement et en toute connaissance de cause du nombre et de l'espacement des naissances et d'avoir accès aux informations, à l'éducation et aux moyens nécessaires pour leur permettre d'exercer ces droits;
- f) Les mêmes droits et responsabilités en matière de tutelle, de curatelle, de garde et d'adoption des enfants, ou d'institutions similaires, lorsque ces concepts existent dans la législation nationale. Dans tous les cas, l'intérêt des enfants sera la considération primordiale;
- g) Les mêmes droits peronnels au marı et à la femme, y compris en ce qui concerne le choix du nom de famille, d'une profession et d'une occupation;
- h) Les mêmes droits à chacun des époux en matière de propriéré, d'acquisition, de gestion, d'administration, de jouissance et de disposition des biens, tant à titre gratuit qu'à titre onéreux.

économique et sociale, afin d'assurer, sur la base de l'égalité de l'homme et de la femme, les mêmes droits et en particulier:

- a) Le droit aux prestations familiales;
- b) Le droit aux prêts bancaires, prêts hypothécaires et autres formes de crédit financier;
- c) Le droit de participer aux activités récréatives, aux sports et à tous les aspects de la vie culturelle.

Article 14

1. Les Etats parties tiennent compte des problèmes particuliers qui se posent aux femmes rurales et du rôle important que ces femmes jouent dans la survie économique de leurs familles, notamment par leur travail dans les secteurs non monétaires de l'économie, et prennent toutes les mesures appropriées pour assurer l'application des dispositions de la présente Convention aux femmes des zones rurales.

2. Les Etats parties prennent toutes les mesures appropriées pour éliminer la discrimination à l'égatd des femmes dans les zones rurales afin d'assurer, sur la base de l'égalité de l'homme et de la femme, leur participation au développement rural et à ses avantages, et en particulier ils leur assureront le droit:

- a) De participer pleinement à l'élaboration et à l'exécution des plans de développement à tous les échelons;
- b) D'avoir accès aux services adéquats dans le domaine de la santé, y compris aux informations, conseils et services en matière de planification de la famille;
- c) De bénéticier directement des programmes de sécurité sociale;
- d) De recevoir tout type de formation et d'éducation, scolaires ou non, y compris en matière d'alphabétisation fonctionnelle, et de pouvoir bénéticier de tous les services communautaires et de vulgarisation, entre autres pour accroître leurs compétences techniques;
- e) D'organiser des groupes d'entraide et des coopératives afin de permettre l'égalité de chances sur le plan économique qu'il s'agisse de travail salarié ou de travail indépendant;
- f) De participer à toutes les activités de la communauté;
- g) D'avoir accès au crédit et aux prêts agricoles ainsi qu'aux services de commercialisation et aux technologies appropriées, et de recevoir un traitement égal dans les réformes foncières et agraires et dans les projets d'aménagement rural:
- h) De bénéficier de conditions de vie convenables, notamment en ce qui concerne le logement, l'assainissement, l'approvisionnement en électricité et en concerne le logement, l'assainissement, l'approvisionnement en électricité et en concerne le los communications.

c) Le droit au libre choix de la profession et de l'emploi, le droit à la promotion, à la stabilité de l'emploi et à toutes les prestations et conditions de travail, le droit à la formation professionnelle et au recyclage, y compris l'apprentissage, le perfectionnement professionnel et la formation permanente;

d) Le droit à l'égalité de rémunération, y compris de prestation, à l'égalité de traitement pour un travail d'égale valeur aussi bien qu'à l'égalité de traitement en ce qui concerne l'évaluation de la qualité du travail;

e) Le droit à la sécurité sociale, et notamment aux prestations de retraite, de chômage, de maladie, d'invalidité et de vieillesse ou pour tout autre perte de capacité de travail, ainsi que le droit à des congés payés;

 t) Le droit à la protection de la santé et à la sécurité des conditions de travail, y compris la sauvegarde de la fonction de reproduction.

Afin de prévenir la discrimination à l'égard des femmes en raison de leur mariage ou de leur maternité et de garantir leur droit effectif au travail, les Etats parties s'engagent à prendre des mesures appropriées ayant pour objet:

a) D'interdire, sous peine de sanctions, le licenciement pour cause de grossesse ou de congé de maternité et la discrimination dans les licenciements fondée sur le statut matrimonial;

b) D'instituer l'octroi de congés de maternité payés ou ouvrant droit à des prestations sociales comparables, avec la garantie du maintien de l'emploi antérieur, des droits d'ancienneté et des avantages sociaux;

c) D'encourager la fourniture des services sociaux d'appui nécessaires pour permettre aux parents de combiner les obligations familiales avec les responsabilités professionnelles et la participation à la vie publique; en particulier en favorisant l'établissement et le développement d'un réseau de garderies d'enfants;

d) D'assurer une protection spéciale aux femmes enceintes dont il est prouvé que le travail est nocif,

3. Les lois visant à protèger les femmes dans les domaines visés par le présent article, seront revues périodiquement en fonction des connaissances scientifiques et techniques et seront révisées, abrogées ou étendues, selon que de besoin.

Article 12

I. Les Etats parties prendront toutes les mesures appropriées pour éliminer la discrimination à l'égard des femmes dans le domaine des soins de santé en vue de leur assurer, à égalité avec les hommes, les moyens d'accéder aux services médicaux, y compris ceux qui concernent la planification de la famille.

2. Nonobstant les dispositions du paragraphe l ci-dessus, les Etats parties fourniront aux femmes pendant la grossesse, pendant l'accouchement, des services appropriés et, au besoin, gratuits, ainsi qu'une nutrition adéquate pendant la grossesse et l'allaitement.

Article 13

Les Etats parties s'engagent à prendre toutes les mesures appropriées pour éliminer la discrimination à l'égard des femmes dans d'autres domaines de la vie

TROISIEME PARTIE

Article 10

Les Etats parties prennent toutes les mesures appropriées pour éliminer la discrimination à l'égard des femmes afin de leur assurer des droits égaux à ceux des hommes en ce qui concerne l'éducation et, en particulier, pour assurer, sur la base de l'égalité de l'homme et de la femme:

- a) Les mêmes conditions d'orientation professionnelle, d'accès aux études et d'obtention de diplômes dans les établissements d'enseignement de toutes catégories, en zones rurales comme en zones urbaines; cette égalité doit être assurée dans l'enseignement préscolaire, général, technique, professionnel et technique supérieur, ainsi que dans tout autre moyen de formation professionnelle;
- b) L'accès aux mêmes programmes, aux mêmes examens, à un personnel enseignant possédant les qualités; à un équipement de même qualité;
- c) L'élimination de toute conception stéréotypée des rôles de l'homme et de la femme à tous les niveaux et dans toutes les formes d'enseignement en encourageant l'éducation mixte et d'autres types d'éducation qui aideront à réaliser cet objectif, et, en particulier, en révisant les livres et programmes scolaires et en adaptant les méthodes pédagogiques;
- d) Les mêmes possibilités en ce qui concerne l'octroi de bourses et autres subventions pour les études;
- e) Les mêmes possibilités d'accès aux programmes d'éducation permation fonctionnelle, en vue notamment de réduire au plus tôt tout écart d'instruction existant entre les hommes et les femmes;
- f) La réduction des taux d'abandon féminin des études et l'organisation de programmes pour les filles et les femmes qui ont quitté l'école prématurément;
- g) Les mêmes possibilités de participer activement aux sports et à l'éducation physique;
- h) L'accès à des renseignements spécifiques d'ordre éducatif rendant à assurer la santé et le bien-être des familles, y compris l'information et des conseils relatifs à la planification de la famille.

Article II

- 1. Les Etats parties s'engagent à prendre toutes les mesures appropriées pour éliminer la discrimination à l'égatd des femmes dans le domaine de l'emploi, afin d'assurer, sur la base de l'égalité de l'homme et de la femme, les mêmes droits, et en particulier:
- a) Le droit au travail en tant que droit inaliénable de tous les êtres humains;
- b) Le droit aux mêmes possibilités d'emploi, y compris l'application des mêmes critères de sélection en matière d'emploi;

pratiques coutumières, ou de tout autre type, qui sont fondés sur l'idée de l'infériorité ou de la supériorité de l'un ou l'autre sexe ou d'un rôle stéréotypé des hommes et des femmes;

b) Pour faire en sorte que l'éducation familiale contribue à faire bien comprendre que la maternité est une fonction sociale et à faire reconnaître la responsabilité commune de l'homme et de la femme dans le soin d'élever leurs enfants et d'assurer leur développement, étant entendu que l'intérêt des enfants est la condition primordiale dans tous les cas.

Article 6

Les Etats parties prennent toutes les mesures appropriées, y compris des dispositions législatives, pour réprimer, sous toutes leurs formes, le trafic des femmes et l'exploitation de la prostitution des femmes.

DEUXIEME PARTIE

Article 7

Les Etats parties prennent toutes les mesures voulues pour éliminer la discrimination à l'égard des femmes dans la vie politique et publique du pays et, en particulier, leur assure, dans des conditions d'égalité avec les hommes, le droit des

A) Voter à toutes les élections et dans tous les référendums publics et être éligibles à tous les organismes publiquement élus;

b) Prendre part à l'élaboration de la politique de l'Etat et à son exécution, occuper des emplois publics et exercer toutes les fonctions publiques à tous les échelons du gouvernement;

c) Participer aux organisations et associations non gouvernementales s'occupant de la vie publique et politique du pays.

Article 8

Les Etats parties prennent toutes les mesures voulues pour que les femmes, dans des conditions d'égalité avec les hommes et sans aucune discrimination, aient la possibilité de représenter leur gouvernement à l'échelon international et de participer aux travaux des organisations internationales.

Article 9

1. Les Etats parties accordent aux femmes des droits égaux à ceux des hommes en ce qui concerne l'acquisition, le changement et la conservation de la nationalité. Ils garantissent en particulier que ni le mariage avec un étranger, ni le changement de nationalité du mari pendant le mariage ne change automatiquement la nationalité de la femme, ni ne la rend apatride, ni ne l'oblige à prendre la nationalité de son mari.

2. Les Etats parties accordent à la femme des droits égaux à ceux de l'homme en ce qui concerne la nationalité de leurs enfants.

n'est déjà fait, et à assurer par voie de législation ou par d'autres moyens appropriés l'application effective dudit principe;

b) Adopter des mesures législatives et d'autres mesures appropriées assorties, y compris des sanctions, et tant que de besoin, interdisant toute discrimination à l'égard des femmes;

c) Instaurer une protection juridictionnelle des droits des femmes sur un pied d'égalité avec les hommes et à garantir, par le truchement des tribunaux nationaux compétents et d'autres institutions publiques, la protection effective des femmes contre tout acte discriminatoire;

d) S'abstenir de tout acte ou pratique discriminatoire à l'égard des femmes et à faire en sorte que les autorités publiques et les institutions publiques se conforment à cette obligation;

e) Prendre toutes mesures appropriées pour éliminer la discrimination pratiquée à l'égard des femmes par une personne, une organisation ou une entreprise quelconque;

t) Prendre toutes les mesures appropriées, y compris des dispositions législatives, pour modifier ou abroger toute loi, disposition réglementaire, coutume ou pratique qui constitue une discrimination à l'égard des femmes;

g) Abroger toutes les dispositions pénales qui constituent une discrimination à l'égard des femmes.

Article 3

Les Etats parties prennent dans tous les domaines, notamment dans les domaines politique, social, économique et culturel, toutes les mesures appropriées, y compris des dispositions législatives, pour assurer le plein développement et le progrès des femmes, en vue de leur garantir l'exercice et la jouissance des droits de l'homme et des libertés fondamentales sur la base de l'égalité avec les hommes;

Article 4

L'adoption par les Etats parties de mesures temporaires spéciales visant à accélèrer l'instauration d'une égalité de fait entre les hommes et les femmes n'est pas considérée comme un acte de discrimination tel qu'il est défini dans la présente Convention, mais ne doit en aucune façon avoir pour conséquence le maintien de normes inégales ou distinctes; ces mesures doivent être abrogées dès que les objectifs en matière d'égalité de chances et de traitement ont été atteints;

L'adoption par les Etats parties de mesures spéciales, y compris de mesures prévues dans la présente Convention, qui visent à protèger la maternité n'est pas considérée comme un acte discriminatoire.

Article 5

Les Etats parties prennent toutes les mesures appropriées:

a) Pour modifier les schémas et modèles de comportement socio-culturel de l'homme et de la femme en vue de parvenir à l'élimination des préjugés et des

quels que soient leurs systèmes sociaux et économiques, le désarmement générale et complet et en particulier le désarmement nucléaire sous contrôle international strict et efficace, l'affirmation des principes de la justice, de l'égalité et de l'avantage mutuel dans les relations entre pays et la réalisation du droit des peuples assujettis à une domination étrangère et coloniale et à une occupation peuples assujettis à une domination étrangère et coloniale et à une occupation souveraineté nationale et de l'intégrité territoriale favoriseront le progrès social souveraineté nationale et la l'intégrité territoriale favoriseront le progrès social et le développement et contribueront par conséquent à la réalisation de la pleine et le développement et la femme,

Convaincus que le développement complet d'un pays, le bien-être du monde et la cause de la paix demandent la participation maximale des femmes, à égalité avec les hommes, dans tous les domaines,

Conscients de l'importance de la contribution des femmes au bien-être de la famille et au progrès de la société, qui jusqu'à présent n'a pas été pleinement reconnue, de l'importance sociale de la maternité et du rôle des parents dans la financian des enfants et conscients du fait que le rôle de la femme dans la procréation ne doit pas être une cause de discrimination et que l'éducation des enfants exige le partage des responsabilités entre les hommes, les femmes et la société dans son ensemble,

Conscients que le rôle traditionnel de l'homme dans la famille et dans la sociére doit évoluer autant que celui de la femme si on veut parvenir à une réelle égalité de l'homme et de la femme,

Résolus à mettre en oeuvre les principes énoncés dans la Déclaration sur l'élimination de la discrimination à l'égaid des femmes et, pour ce faire, à adopter les mesures nécessaires à la suppression de cette discrimination sous toutes ses formes et dans toutes ses manifestations,

Sont convenus de ce qui suit

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PREMIERE PARTIE

Article premier

Aux fins de la présente convention, l'expression "discrimination à l'égard des femmes" vise toute distinction, exclusion ou restriction fondée sur le sexe qui a pour effet ou pour but de compromettre ou de détruire la reconnaissance, la la base de l'égalité de l'homme et de la femme, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social, culturel et civil ou dans tout autre domaine.

Article 2

Les Etats parties condamnent la discrimination à l'égard des femmes sous ses formes, conviennent de poursuivre par tous les moyens appropriés et sans retard une politique tendant à éliminer la discrimination à l'égard des femmes, et, à cette fin, s'engagent à:

a) Inscrire dans leur constitution nationale ou toute autre disposition législative appropriée le principe de l'égalité des hommes et des femmes, si ce

Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes

Les Etats parties à la présente Convention,

Considérant que la Charte des Nations Unies réaffirme la foi dans les droits fondamentaux de l'homme, dans la dignité et la valeur de la personne humaine et dans l'égalité de droits des hommes et des femmes,

Considérant que la Déclaration universelle des droits de l'homme affirme le principe de la non-discrimination et proclame que tous les êtres humains naissent libres et égaux en dignité et en droit et que chacun peut se prévaloir de tous les droits et de toutes les libertés qui y sont énoncés, sans distinction aucune, notamment de sexe,

Considérant que les Etats parties aux Pactes internationaux relatifs aux droits de l'homme en d'essaire des droits de l'homme et de la femme dans l'exercice de tous les droits économiques, sociaux, culturels, civils et politiques,

Tenant compte des conventions internationales conclues sous l'égide de l'Organisation des Nations Unies et des institutions spécialisées en vue de promouvoir l'égalité des droits de l'homme et de la femme,

Motant également les résolutions, déclarations et recommandations adoptées par l'Organisation des Nations Unies et les institutions spécialisées en vue de promouvoir l'égalité des droits de l'homme et de la femme,

Préoccupés toutefois de constater qu'en dépit de ces divers instruments les femmes continuent de faire l'objet d'importantes discriminations,

Rappellant que la discrimination à l'encontre des femmes viole les principes de l'égalité des droits et du respect de la dignité humaine, qu'elle entrave la participation des femmes, dans les mêmes conditions que les hommes, à la vie politique, sociale, économique et culturelle de leur pays, qu'elle fait obstacle à l'accroissement du bien-être de la société et de la famille et qu'elle empêche les l'accroissement du bien-être de la société et de la famille et qu'elle empêche les femmes de servir leur pays et l'humanité dans toute la mesure de leurs possibilités,

Préoccupés par le fait que dans les situations de pauvreté, les femmes ont un minimum d'accès à l'alimentation, à l'éducation, à la formation ainsi qu'aux possibilités d'emploi et à la satisfaction d'autres besoins,

Convaincus que l'instauration du nouvel ordre économique international fonde sur l'équité et la justice contribuera de façon significative à promouvoir l'égalité entre l'homme et la femme,

Soulignant que l'élimination de l'apartheid, de toutes les formes de racisme, de discrimination raciale, de colonialisme, de néo-colonialisme, d'agression, d'occupation et de domination étrangères intérieures des États et d'ingérence dans les atfaires est indispensable à la pleine jouissance par l'homme et la femme de leurs droits,

Affirmant que le renforcement de la paix et de la sécurité internationales, le relâchement de la tension internationale, la coopération entre tous les Etats



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Article 28

Les dispositions de la présente Convention annulent et remplacent, entre les Parties, les dispositions des instruments internationaux mentionnés aux alinéas 1, 2, 3 et 4 du deuxième paragraphe du Préambule; chacun de ces instruments sera considéré comme ayant cessé d'être en vigueur quand toutes les Parties à cet instrument seront devenues Parties à la présente Convention.

EN FOI DE QUOI, les soussignées, dûment autorisées par leurs Gouvernements respectifs, ont signé la présente Convention, qui a été ouverte à la signature à Lake Success, New-York, le vingt et un mars mil neuf cent cinquante, et dont une copie certifiée conforme sera envoyée par le Secrétaire général à tous les États Membres de l'Organisation des Nations Unies et aux États non membres visée par l'article 23.

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Article 24

ratifie la Convention, ou y adhère, ainsi que tous les territoires que cet Etat

toutes les colonies et Territoires sous tutelle dépendant de l'État qui signe ou

Aux fins de la présente Convention, le mot « État » désignera également

L'adhésion se sera par le dépôt d'un instrument d'adhésion auprès du

Les États mentionnés au paragraphe premier, qui n'ont pas signé la Con-

cstron ou d'adhésion. quatre-ningramin de son instrument de son instrument de son instrument de ratifideuxième instrument de ratification ou d'adhésion, elle entrera en vigueur Pour chacun des États qui ratifieront ou adhéreront après le dépôt du qui suivra la date du dépôt du deuxième instrument de ratification ou d'adhésion. La présente Convention entrera en vigueur le quatre-vingt-dixième jour

Article 25

fication écrite adressée au Secrétaire général de l'Organisation des Mations présente Convention, toute Partie à la Convention peut la dénoncer par noti-A l'expiration d'un délai de cinq ans à partir de l'entrée en vigueur de la

Nations Unies. à laquelle elle aura été reçue par le Secrétaire général de l'Organisation des La dénonciation prendra effet pour la Partie intéressée un an après la date

Article 26

mentionnés à l'article 23 : les Etats Membres de l'Organisation des Nations Unies et aux Etats non membres Le Secrétaire général de l'Organisation des Nations Unies notifiera à tous

Particle 23; a) Les signatures, ratifications et adhésions reçues en application de

cation de l'article 24; b) La date à laquelle la présente Convention entrera en vigueur, en appli-

c) Les dénonciations reçues en application de l'article 25.

Article 27

l'application de la Convention s sa Constitution, les mesures législatives ou autres, nécessaires pour assurer Chaque Partie à la présente Convention s'engage à prendre, conformément

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à la présente Convention facilitera le transit des personnes en question sur son ainsi que sur le lieu et la date de l'arrivée aux frontières. Chacune des Parties esfectué qu'après entente sur l'identité et la nationalité avec l'Etat de destination, dont l'expulsion est décrétée conformément à la loi. Le rapatriement ne sera

à la charge de l'Etat d'origine. ou à l'aéroport le plus proche dans la direction de l'Etat d'origine, et, au-delà, charge de l'Etat où elles se trouvent jusqu'à la frontière, au port d'embarquement, ni parent, ni tuteur qui payerait pour elles, les frais de rapatriement seront à la elles-mêmes les frais de leur rapatriement et où elles n'auraient ni conjoint, Au cas où les personnes visées à l'alinéa précédent ne pourraient rembouraer

Article 20

de la prostitution. emploi, particulièrement les femmes et les enfants, ne soient exposées au danger ou agences de placement, en vue d'éviter que les personnes qui cherchent un à prendre les mesures nécessaires pour exercer une surveillance sur les bureaux Les Parties à la présente Convention s'engagent, si elles ne l'ont déjà fait,

dispositions de l'article 23. présente Convention aura été officiellement communiquée, conformément aux de l'Organisation des Nations Unies et aux Etats non membres auxquels la publiés périodiquement par le Secrétaire général et adressés à tous les Membres prises pour l'application de la Convention. Les renseignements reçus seront à l'objet de la présente Convention, ainsi que toutes mesures qu'elles auront et, annuellement par la suite, tous nouveaux textes de lois ou reglements relatifs général de l'Organisation des Nations Unies leurs lois et règlements en vigueur Les Parties à la présente Convention communiqueront au Secrétaire

Article 22

au différend, soumis à la Cour internationale de Justice. regle par d'autres moyens, il sera, à la demande de l'une quelconque des Parties relatif à son interprétation ou à son application, et si ce différend ne peut être S'il s'èlève entre les Parties à la présente Convention un différend quelconque

Article 23

Elle sera ratifiée et les instruments de ratification seront déposés auprès économique et social aura adressé une invitation à cet effet. de l'Organisation des Nations Unies et de tout autre Etat auquel le Conseil La présente Convention sera ouverte à la signature de tous les Etats Membres

du Secrétaire général de l'Organisation des Nations Unies.

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Article 17

Les Parties à la présente Convention conviennent, en ce qui concerne l'immigration et l'émigration, de prendre ou de maintenir en vigueur, dans les destinées de leurs obligations définies par la présente Convention, les mesures destinées à combattre la traite des personnes de l'un ou de l'autre sexe aux fins de prostitution.

Elles s'engagent notamment:

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I. A promulguer les règlements nécessaires pour la protection des immigrants ou émigrants, en particulier des femmes et des enfants, tant aux lieux d'arrivée et de départ qu'en cours de route;

2. A prendre des dispositions pour organiser une propagande appropriée qui mette le public en garde contre les dangers de cette traite;

3. À prendre les mesures appropriées pour qu'une surveillance soit exercée dans les gares, les aéroports, les ports maritimes, en cours de voyage et dans les lieux publics, en vue d'empêcher la traite internationale des êtres humains aux fins de prostitution;

4. A prendre les mesures appropriées pour que les autorités compétentes soient prévenues de l'arrivée de personnes qui paraissent manifestement coupables, complices ou victimes de cette traite.

Article 18

Les Parties à la présente Convention s'engagent à faire recueillir, conformément aux conditions stipulées par leur législation nationale, les déclarations des personnes de nationalité étrangère qui se livrent à la prostitution, en vue d'établir leur identité et leur état civil et de rechercher qui les a décidées à quitter leur État. Ces renseignements seront communiqués aux autorités de l'État d'origine desdites personnes en vue de leur rapatriement éventuel.

Article 19

Les Parties à la présente Convention s'engagent, conformément aux conditions stipulées par leur législation nationale et sans préjudice des poursuites ou de toute autre action intentée pour des infractions à ses dispositions et autant que faire se peut:

1. A prendre les mesures appropriées pour pourvoir aux besoins et assurer l'entretien, à titre provisoire, des victimes de la traite internationale aux fins de prostitution, lorsqu'elles sont dépourvues de ressources en attendant que soient prises toutes les dispositions en vue de leur rapatriement;

2. A rapatrier celles des personnes visées à l'article 18 qui le désirenaient ou qui servient réglemère par de l'ortsonnes ayant autoriès réglemères par de l'ortsonnes ayant autoriès servient de la désirenaient ou qui servient sur les particles de la désirenaient de la désirence de la desirence de la désirence de la desirence desirence de

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L'exécution des commissions rogatoires ne pourra donner lieu au remboursement d'aucun droit ou frais autres que les frais d'expertise.

Rien dans le présent arricle ne devra être interprété comme constituant de la part des Parties à la présente Convention un engagement d'admettre une dérogation à leurs lois en ce qui concerne la procédure et les méthodes employées pour établir la preuve en matière répressive.

Article 14

Chacune des Parties à la présente Convention doit créer ou maintenir un service chargé de coordonner et de centraliser les résultats des recherches relatives aux infractions visées par la présente Convention.

Ces services devront réunir tous les renseignements qui pourraient sider à prévenir et à réprimer les infractions visées par la présente Convention et devront se tenir en contact étroit avec les services correspondants des autres États.

Article 15

Dans la mesure où le permet la législation nationale et où elles le jugeront utile, les autorités chargées des services mentionnés à l'article 14 donneront aux autorités chargées des services correspondants dans les autres États les renseignements suivants:

le Des précisions concernant toute infraction ou tentative d'infraction visée par la présente Convention;

2. Des précisions concernant les recherches, poursuites, arrestations, condamnations, refus d'admission ou expulsions de personnes coupables de l'une d'eplacements de ces personnes et tous autres renseignements utiles à leur aujet.

Les renseignements à fournir comprendront notamment le signalement des déplacements, leurs empreintes divitales et leur, appointants, leurs empreintes divitales et leur, appointes des indications.

délinquants, leurs empreintes digitales et leur photographie, des indications sur leurs procédés habituels, les procès-verbaux de police et les casiers judicisires.

Article 16

Les Parties à la présente Convention conviennent de prendre ou d'encourager, par l'intermédiaire de leurs services sociaux, économiques, d'enseignement, d'hygiène et autres services connexes, qu'ils soient publics ou privés, les mesures propries à prévenir la prostitution et à assurer la rééducation et le reclassement des victimes de la prostitution et des infractions visées par la présente Convention.

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Article II

international. générale de la compétence de la juridiction pénale comme question de droit portant atteinte à l'attitude d'une Partie à ladite Convention sur la question Aucune disposition de la présente Convention ne sera interprétée comme

Article 12

la législation nationale. doivent dans chaque Etat être qualifiés, poursuivis et jugés conformément à La présente Convention laisse intact le principe que les actes qu'elle vise

Article 13

leur législation nationale et à leur pratique en cette matière. rogatoires relatives aux infractions visées par la Convention, conformément à Les Parties à la présente Convention sont tenues d'exécuter les commissions

La transmission des commissions rogatoires doit être opérée:

requérant, au Ministre de la Justice de l'État requis; deux États, ou par envoi direct, par une autre autorité compétente de l'État 2. Soit par correspondance directe entre les Ministres de la Justice de 1. Soit par voie de communication directe entre les autorités judiciaires;

pièces constituant l'exécution des commissions rogatoires. Gouvernement de l'État requis, et recevra directement de cette autorité les rogatoires à l'autonité judiciaire compétente ou à l'autonité indiquée par le requérant dans l'État requis; cet agent enverra directement les commissions 3. Soit par l'intermédiaire de l'agent diplomatique ou consulaire de l'État

en même temps à l'autonité supérieure de l'État requis. Dans les cas 1 et 3, copie de la commission rogatoire sera toujours adressée

conforme par l'autorité requérante. droit d'en demander une traduction faite dans sa propre langue et certifiée dans la langue de l'autorité requérante, sous réserve que l'État requis aura le A défaut d'entente contraire, la commission rogatoire doit être rédigée

toires de ladite Partie. des modes de transmission susvisés qu'elle admet pour les commissions roganication adressée à chacune des autres Parties à la Convention, celui ou ceux Chaque Partie à la présente Convention sera connaître, par une commu-

en vigueur en fait de commissions rognivites sera maintenue. Jusqu'au moment où un État fera une telle communication, la procédure

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Delicle 6

nonnelles de surveillance ou de déclaration. spéciaux, posséder des papiers spéciaux, ou se conformer à des conditions excepsoupçonnées de se livrer à la prostitution doivent se faire inscrire sur des registres pracique administrative selon lesquels les personnes qui se livrent ou sont les mesures nécessaires pour abroger ou abolir toute loi, tout règlement et toure Chacune des Parties à la présente Convention convient de prendre toures

la législation nationale, prise en considération : des actes visés dans la présente Convention sera, dans la mesure où le permet Toute condamnation antérieure prononcée dans un État étranger pour un

1. Pour établir la récidive;

public ou privé. 2. Pour prononcer des incapacités, la déchéance ou l'interdiction de droit

Article 8

ou à conclure entre des Parties à la présente Convention. seront considérés comme cas d'extradition dans tout traité d'extradition concilu Les actes visés à l'article premier et à l'article 2 de la présente Convention

et à l'article 2 de la présente Convention comme cas d'extradition entre elles. à l'existence d'un traité reconnaissent dorénavant les actes visés à l'article premier Les Parties à la présente Convention qui ne subordonnent pas l'extradition

L'extradition sera accordée conformément au droit de l'Etat requis.

Article 9

doivent être poursuivis devant les tribunaux de leur propre Etat et punis par l'un des actes visés par l'article premier et par l'article 2 de la présente Convention des nationaux et qui sont rentrés dans cet Etat après avoir commis à l'étranger Les ressortissants d'un Etat dont la législation n'admet pas l'extradition

être accordée. des Parties à la présente Convention, l'extradition d'un étranger ne peut pas Cette disposition n'est pas obligatoire si, dans un cas semblable interessant

Article 10

dudit Bint étringen beine ou benefice d'une remise ou d'une réduction de peine prevue par la loi juge dans un Etat étranger, et, en cas de condamnation, lorsqu'il a purge la Les dispositions de l'article 9 ne s'appliquent pas lorsque l'inculpe a ete

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de Convention de 1937 avec les amendements que l'on a jugé bon d'y apporter; qui unifie les instruments ci-dessus mentionnés et renferme l'essentiel du projet Considérant que l'évolution depuis 1937 permet de conclure une convention

Conviennent de ce qui suit: Les Parties Contractantes En conséquence,

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Article premier

qui, pour satisfaire les passions d'autrui : Les Parties à la présente Convention conviennent de punir toute personne

personne, même consentante; 1. Embauche, entraîne ou détourne en vue de la prostitution une autre

2. Exploite la prostitution d'une autre personne, même consentante.

Article 2

toute personne qui : Les Parties à la présente Convention conviennent également de punir

de prostitution; 1. Tient, dirige ou, sciemment, finance ou contribue à financer une maison

immeuble ou un autre lieu aux fins de la prostitution d'autrui. 2. Donne ou prend sciemment en location, en tout ou en partie, un

Article 3

l'article premier et à l'article 2 doivent aussi être punis. tout acte préparatoire accomplis en vue de commettre les infractions visées à Dans la mesure où le permet la législation nationale, toute tentative et

Article 4

pumssable. tionnelle aux actes visés à l'article premier et à l'article 2 ci-dessus est aussi Dans la mesure où le permet la législation nationale, la participation inten-

procéder ainsi pour empêcher l'impunité. seront considérés comme des infractions distinctes dans tous les cas où il faudra Dans la mesure où le permet la legislation nationale, les actes de participation

se constituer partie civile dans les mêmes conditions que les nationaux. visées par la présente Convention, les étrangers seront également autorisés à nale à se constituer partie civile du chef de l'une quelconque des infractions Dans tous les cas où une personne lésée est autorisée par la législation natio-

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PRÉAMBULE

Considérant que la prostitution et le mal qui l'accompagne, à savoir la traite des êtres humains en vue de la prostitution, sont incompatibles avec la dignité et la valeur de la personne humaine et mettent en danger le bien-être de l'individu, de la famille et de la communauté,

Considérant qu'en ce qui concerne la répréssion de la traite des femmes et des enfants, les instruments internationaux suivants sont en vigueur :

1. Arrangement international du 18 mai 1904º pour la répression de la traite des blanches, amendé par le Protocole approuvé par l'Assemblée générale des Nations Unies, le 3 décembre 1948,

2. Convention internationale du 4 mai 1910³ relative à la répression de la traite des blanches, amendée par le Protocole susmentionné,

3. Convention internationale du 30 septembre 1921' pour la répression de la traite des femmes et des enfants, amendée par le Protocole approuvé par l'Assemblée générale des Nations Unies, le 20 octobre 1947,

4. Convention internationale du 11 octobre 1933⁵ pour la répression de la traite des femmes majeures, amendée par le Protocole susmentionné,

Considérant que la Société des Nations avait élaboré en 1937 un projet de Convention⁶ étendant le champ des instruments susmentionnés, et

¹ Entrée en vigueur le 25 juillet 1951, le quarre-vingr-dixième jour qui a suivi la date de dépôt du deuxième instrument de ratification ou d'adhésion, conformément à l'article 24. Les États suivants ont déposé auprès du Secrétaire général de l'Organisation des Nations Les États suivants ont déposé auprès du Secrétaire général de l'Organisation des Nations. Unites leurs instruments de ratification ou d'adhésion aux dates indiquées ci-dessous :

Adriction. — Israel 28 decembre 1950 Ratification. — Yougoslavie . . . 26 avril 1951

Nations Unics, Recueil des Traités, vol. 92, p. 19.
Nations Unics, Recueil des Traités, vol. 98, p. 109.

* Nations Unies, Recueil des Traités, vol. 53, p. 39; vol. 65, p. 333; vol. 76, p. 281; et vol. 77, p. 364.

* Nations Unies, Recueil des Traités, vol. 53, p. 49; vol. 65, p. 334; vol. 76, p. 281, et vol. 77, p. 281, et vol. 77,

Société des Nations, document C.331.M.223.1937.IV.



Société des Nations, Recueil des traités, Convention et internationale pour la répression de la circulation et du trafic des publications obscènes. Signée à Genève le l2 septembre 1923.	.12
Nations Unies, Recueil des traités, Protocole amendant l'Arrangement relatif à la répression de la circulation des publications obscènes, signé à Paris le 4 mai 1949.	.02
Société des Nations, Recueil des traités, Arrangement relatif à la répression de la circulation des publications obscènes. Signé à Paris le 4 mai 1910.	°6T

Les actes de l'Union postale universelle, 2e fascicule, Bureau international de l'Union postale universelle, 23.

le l2 septembre 1923. Signé à Lake Success, New York, du trafic des publications obscènes, conclue à Genève la Convention pour la répression de la circulation et Nations Unies, Recueil des traités, Protocole amendant

le l2 novembre 1947.

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Berne, 1980, 414 p.

the international postal service and the provisions concerning the letter-post services". rédigée : "... embody the rules applicable throughout constitution de l'Union postale universelle est ainsi La version anglaise du paragraphe 22(3) de la

télécommunications, Convention internationale des télécommunications, Genève, 1982, 365 p. Secrétariat général de l'Union internationale des

decency to the laws of the country, the public order, or to appear dangerous to the safety of the state or contrary of any private telegram or radiotelegram which might governments reserve the right to stop the transmission Convention de 1932 est ainsi rédigée : "The signing La version anglaise du paragraphe 26(1) de la

Cette résolution "Prie le Secrétaire général de désigner un rapporteur spécial qui, (...) assurera la synthèse des enquêtes et études relatives à la traite des étres humains et à l'exploitation de la prostitution d'autrui déjà réalisées ou en cours (...) et qui présentera cette synthèse et proposera les mesures présentera cette synthèse et proposera les mesures propres à prévenir et à réprimer ces pratiques contraires aux droits fondamentaux de la personne humaine res aux droits fondamentaux de la personne humaine la contraire.

Ce rapport a été présenté par M. Jean Fernand-Laurent le 17 mars 1983 : Conseil économique et social, Activités destinées à la promotion de la femme : égalité, développement et paix. Rapport de M. Jean Fernand-Laurent, Rapporteur spécial, sur la répression et l'abolition de la traite des êtres humains et de l'exploitation de la prostitudes

E/1983/7, 17 mars 1983.

11. Nations Unies, La Charte internationale des droits de 1'homme, New York, 1978, p. 5-11. (Déclaration universelle des droits de l'homme)

12. Id., p. 12-47. (Pacte international relatif aux droits économiques, sociaux et culturels, Pacte international relatif aux droits civils et politiques et Protocole facultatif)

13. Nations Unies, Résolution 34/180, Convention sur 1'élimination de toutes les formes de discrimination à l'édatd des femmes. Adontée nat l'éssemblée dépérale

l'égard des femmes. Adoptée par l'Assemblée générale le 18 décembre 1979. l4. Société des Nations, Recueil des traités, Convention relative à l'esclavage. Signée à Genève le 25

septembre 1926.

Lions, New York, Columbia University Press, 1969.

16. Commision on Human Rights, Report of the Eighteenth

Session (19 March - 14 April 1962), Economic and Social Council, United Nations, Document E/3616, rev. 1, para, 105.

17. Fernand-Laurent, J., op.cit., p. 18.

tion d'autrui.

18. Nations Unies, Étude sur la traite des êtres humains et la prostitution, op. cit., p. 8-9.

NOTES

- 1. Société des Nations, Recueil des traités, no II, Arrangement international en vue d'assurer une protection efficace contre le trafic criminel connu sous le nom de traite des blanches. Signé à Paris le 18 mai 1904.
- Société des Nations, Recueil des traités, Convention internationale relative à la répression de la traite des blanches. Signée à Paris le 4 mai 1910.
- Société des Nations, Recueil des traités, Convention internationale pour la répression de la traite des femmes et des enfants. Signée à Genève le 30 septembre 1921,
- 4. Société des Nations, Recueil des traités, Convention internationale relative à la suppression de la traite des femmes majeures. Signée à Genève le ll octobre
- 5. Société des Nations, Rapport du Comité spécial d'experts sur la traite des femmes et des enfants, Genève, 1927, Première partie, p. 53.

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- 6. Société des Nations, Commission d'enquête sur la traite des femmes et des enfants en Orient, Genève, 1932,
- p. 105.

 Nations Unies, Recueil des traités, Protocole amendant
 la Convention pour la répression de la traite des
- 1947.

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- 8. Nations Unies, Recueil des traités, Convention pour la répression de la traite des êtres humains et de l'exploitation de la prostitution d'autrui (avec son Protocole de clôture). Ouverte à la signature à Lake Success, New York, le 21 mars 1950.
- 9. Nations Unies, Etude sur la traite des êtres humains et la prostitution, Département des affaires économiques et sociales, New York, 1959, p. 12.
- 10. Conseil économique et social, Résolution 1982/20. Lutte contre la traite des êtres humains et l'exploitation de la prostitution d'autrui.

ves à l'endroit des prostituées elles-mêmes, il leur est également recommandé d'interdire tout ce qui est obscène. sout tortement incités à ne pas adopter de mesures répressi-

snr le racolage. droit penal a rendu difficile l'application des dispositions l'opinion publique, même si une interprétation libérale du le principal point de mire des forces policières et de plutot que le proxenête et que le client, a été, et demeure aux dispositions de celle-ci. À cet égard, la prostituée, politiques intérieures ne seront pas totalement conformes Canada de ne pas adhérer à cette convention tant que ses En effet, cela doit davantage être vu comme un souci pour le blement de celles mises de l'avant par les Nations Unies. indication que les politiques canadiennes diffèrent sensisur la prostitution ne doit pas être interprété comme une les. Le refus par le Canada de signer la Convention de 1949 genéralement été en accord avec les politiques internationarea tota penales et les mesures sociales canadiennes ont

enquêtes policières et de l'imposition de leurs revenus. Il épineuses questions du fichage des prostituées aux fins des egard, il convient tout d'abord de trouver des réponses aux réussi à établir une politique nationale cohérente. À cet special, il n'existe probablement encore aucun Etat qui ait tous les éléments en jeu. Comme le souligne le Rapporteur également la difficulté qu'il y a en ce domaine à concilier La non signature par le Canada de cette convention révèle

qui exigeront beaucoup de temps. prostituées. Il s'agit là de toute évidence d'entreprises l'élimination de la discrimination et la rééducation des faudra ensuite mettre en place des mécanismes favorisant

cerre notion. avec toutes les difficultés que comporte l'interprétation de respecte pleinement l'esprit des textes des Nations Unies, En ce qui concerne l'obscénité, le droit pénal canadien

de demeurer lettre morte. d'obscénité), elles risquent de tomber dans le discrédit et pas précisément ce qu'elles condamnent (comme en matière en matière de prostitution) ou tant qu'elles ne définissent tiques nationales γ sont fondamentalement contraires (comme qu'elles peuvent être ratifiées par des États dont les polinales peuvent bien exprimer des objectifs communs, mais tant ment des réalités politiques. Ces déclarations internationales des réalités de tous les jours, et plus particulièreterme et, de l'autre, l'influence sur les politiques natioles politiques internationales et les objectifs à long problèmes fondamentaux demeurera l'écart entre, d'un côté, objectifs visés par les politiques internationales, un des Quelle que soit la terminologie utilisée ou encore les

celui de l'école, les "stêréotypes qui dévalorisent la femme et la présentent comme destinée au plaisir physique de l'homme" (op.cit., p. 32). Le Rapporteur spécial ajoute de plus que les États Membres devraient "reconnaître la distinction à faire entre l'érotique et l'obscène et (...) déclarer la guerre tout au moins à la pornographie, qui outrage de préférence le corps féminin et qui, en séparant outrage de préférence le corps féminin et qui, en séparant les relations sexuelles des relations affectives, les Comme chacun sait, cette distinction est très difficile en pratique.

II.3 Position du Canada

La position du Canada en ce qui concerne l'obscénité est bien plus simple qu'en matière de prostitution. Le Canada est partie à tous les accords sur le sujet qui ont été signés et déposés auprès du Secrétaire général et est membre de la Convention postale universelle et de la Convention internationale des télécommunications. Quant à l'abstention du Canada lors du vote de la Résolution 1983/30, il en a dejà été question dans la partie concernant la prostitution.

La législation canadienne est davantage conforme aux principes énoncés dans ces accords qu'à ceux qui ont été établis en matière de prostitution. Les accords relatifs à l'obscénité n'ont pas soulevé de problèmes de partage constitutionnel des compétences ni nécessité de modifications au Code criminel ou à d'autres lois fédérales. Le Code criminel utilise le terme "obscénité" et notre jurisprudence s'est utilise le terme "obscénité" et notre jurisprudence s'est constamment efforcée d'en préciser le sens.

CONCINCION

Jusqu'au rapport du Rapporteur spécial inclusivement, la tendance des Nations Unies et des ses organismes affiliés a clairement été de considérer la prostitution comme un problème social plutôt que moral, et de mettre l'accent sur la réfeucation des prostituées. Les accords sur le sujet s'inscrivent dans un prostituées. Les accords sur le sujet s'inscrivent dans un ensemble de politiques des Nations Unies destinées à inciter les femmes dans tous les domaines. Certains l'égalité des femmes sont poussées à la prostitution par les inégalités économiques et sociales qui elles-mêmes découlent de la domination des hommes. À partir des mêmes arguments, on a récemment condamné la pornographie comme constituant une autre manifestation des sociétés sexistes et constituant une autre manifestation des sociétés sexistes et dominées par les hommes. Par conséquent, même si les États

L'invitation à freiner la pornographie qui est énoncée dans la Résolution 1983/30 soulève également la question de la définition de cette expression. On peut se demander si la pornographie n'est pas ce que M. Fernand-Laurent appelle, dans son examen du rôle de l'UNESCO et plus précisément de dans son examen du rôle de l'UNESCO et plus précisément de

tions et la Convention postale universelle. ment dans la Convention internationale des télécommunica-"bonnes moeurs" et "immoraux" qui sont utilisées respective-Les mêmes difficultés se posent relativement aux expressions être poursuivies dans le pays où elles ont été commises. mentionnées à l'article ler de la Convention de 1923 peuvent tion se trouve accentué par le fait que les infractions et les éléments constitutifs des infractions en la matière peuvent varier considérablement. Ce problème d'interprétaseront appliquées de la même façon), la notion d'obscénité rents Etats contiendront les mêmes définitions ni qu'elles (ce qui ne signifie pas pour autant que les lois des diffédéfinies de façon relativement uniforme d'un Etat à l'autre la prostitution d'autrui sont des notions qui peuvent être ces accords. Alors que la prostitution et l'exploitation de même d'obscénité soulève certains problèmes particuliers à contribue & en assurer le respect. Cependant, la notion bilité de condamnation morale de la part des autres Etats administratives des Etats Membres. D'autre part, la possirapport a la législation intérieure et aux pratiques ces accords ont une valeur contraignante relative par également à ceux concernant l'obscénité. En d'autres mots, de la portée des accords sur la prostitution s'appliquent De façon générale, les remarques qui ont été faites au sujet

II.2 Portée des accords

ou aux bonnes moeurs" (les soulignés sont de nous). sureté de l'Etat ou contraire à ses lois, à l'ordre public munication privée qui peut paraître dangereuse pour la réservent aussi le droit d'interrompre toute autre télécomalors que le paragraphe 19(2) dispose que "Les Membres se paragraphe 19(1) ne s'applique maintenant qu'aux télégrammes l'article concernant l'arrêt des télécommunications. la nouvelle convention a adopté une nouvelle formulation de encore que les communications constituent un service public, rendu cette révision nécessaire. Tout en reconnaissant marqué les télécommunications au plan technique avaient Torremolinos en 1973. Les changements profonds qui ont été adoptée à Montreux en 1965 et modifiée à Malagacations telephoniques (par. 26(2). Une seconde convention a Ces dispositions s'appliquent également aux communiaux bonnes moeurs..." (par. 26(1); (les soulignés sont de de l'Etat ou contraire aux lois du pays, à l'ordre public ou

Limites & L'érotisme et faire obstacle & la pornographie, quels que soient les médias qu'elle emprunte (...). Ne serait-il pas incohérent de laisser toute liberté & ce qui excite les sens, tout en condamnant comme immoraux les moyens de les apaiser?"

Adoptée suite à ce rapport, la Résolution 1983/30 recommande aux États membres, en son paragraphe 3d), d'élaborer des politiques tendant à "Freiner l'industrie et le commerce de la pornographie et les réprimer très sévèrement quand des mineurs s'y trouvent impliqués."

ouvrir d'office." envois de la poste aux lettres et, le cas échéant, à les controle douanier, selon la législation de ces pays, les d'origine et celle du pays de destination "à soumettre au l'article 37 autorise l'administration postale du pays destinataires, ni renvoyés à l'origine." Par ailleurs, sont en aucun cas ni acheminés à destination, ni livrés aux par. (4), ce qui inclut les objets obscênes ou immoraux, "ne paragraphe 36(6) dispose que certains envois énumérés au dite, dont "les objets obscenes ou immoraux" (alinéa e). différents objets dont l'expédition par la poste est intertions tres precises. En son paragraphe 36(4), elle enumère (art. ler). La Convention établit à cette fin des dispositaux et de fournir une aide technique aux Etats Membres voir & l'organisation et & l'amélioration des services posd'assurer la liberté de transit sur tout son territoire, de de la poste aux lettres" (par. 22(3). L'Union a pour but national ainsi que les dispositions concernant les services sent les règles applicables à tout le service postal interselle et ses règlements d'exécution [Traduction] "définis-Congrès de Tokyo, énonce que la Convention postale univer-Sa constitution, qui a été modifiée en 1969 au L'Union postale universelle a été créée à la fin du XIXe La Convention internationale des télécommunications [24]. Unies, soit la Convention postale universelle [23] et On se doit de mentionner deux autres textes des Nations

La première Convention internationale des télécommunications a été signée à Madrid en 1932. Cette convention crée l'Union internationale des télécommunications et en institue la constitution de même que les modalités de fonctionnement. Elle comprend également des dispositions générales reconnaissant que les télécommunications constituent un service public (art. 22). De plus, elle énonce que [Traduction] "les États signataires se réservent le droit d'arrêter la transmission de tout télégramme ou radiotéléd'arrêter la transmission de tout delégramme ou radiotélégramme privé qui peut paraître dangereux pour la sécurité

obscenes, en vue d'en faire commerce ou distribution, ou de les exposer publiquement;

2. D'importer, de transporter, d'exporter ou de faire importer, transporter ou exporter, aux fins ci-dessus, les dits écrits, dessins, gravures, peintures, imprimés, images, affiches, emblèmes, photographies, films cinématographiques ou autres objets obscènes, ou de les mettre en circulation d'une manière ou de les mettre en circulation d'une manière quelconque;

3. D'en faire le commerce même non public, d'effectuer toute opération les concernant de quelque manière que ce soit, de les distribuer, de les exposer publiquement ou de faire métier de les donner en location;

4. D'annoncer ou de faire connaître par un moyen quelconque, en vue de favoriser la circulation ou le trafic à réprimer, qu'une personne se livre à l'un quelconque des actes punissables énumérés ci-dessus; d'annoncer ou de faire connaître comment et par qui les dits écrits, dessins, gravures, peintures, images, images, affiches, emblèmes, photo-imprimés, inages, affiches, emblèmes, photo-objets obscènes peuvent être procurés, soit directement, soit indirectement."

bien que la portée de l'interdiction soit relativement large, son application dépend entièrement de la définition donnée au terme "obscène". Le texte de l'Arrangement et celui de la Convention ne donne aucune indication à cet égard. Tout comme nous l'avons vu à propos des accords relatifs à la prostitution, il appartient aux lois et à la jurisprudence de chacun des États Membres de définit l'obscénité.

A notre connaissance, aucun autre accord portant sur l'obscénité n'a été déposé auprès du Secrétaire général. Toutefois, au paragraphe 68 de son rapport (op. cit., p. 20), le Rapporteur spécial mentionne la nécessité de lutter contre la pornographie afin de prévenir efficacement la prostitution et son exploitation:

"Prēvenir [la prostitution], c'est garantir autant que possible l'égalité d'accès des femmes et des hommes aux formations et aux emplois. (...) C'est aussi mettre des

des enfants, indique qu'il se préoccupe de la situation des femmes et qu'il s'efforce d'en arriver à l'adoption d'une politique juste.

II- Accords en matière d'obscénité

II.1 Historique

La Société des Nations a adopté en 1910 l'Arrangement relatif à la répression de la circulation des publications obscènes [19]. Celui-ci a été modifié en 1949 par le Protocole signé à Lake Success [20] afin d'en confier l'application à l'Organisation des Nations Unies. L'article l'application à l'Organisation des Nations Unies. L'article les de cet arrangement crée l'obligation pour les États Membres:

"1. De centraliser tous les renseignements pouvant faciliter la recherche et la répression des actes constituant des infractions à leur législation interne en matière d'écrits, dessins, images ou objets obscènes, et dont les éléments constitutifs ont un exactère international;

2. De fournir tous renseignements susceptibles de faire obstacle à l'importation des publications ou objets visés au paragraphe précédent comme aussi d'en assurer ou d'en accélérer la saisie, le tout dans les limites de la législation interne;

3. De communiquer les lois qui auraient déjà été rendues ou qui viendraient à l'être dans leurs États, relativement à l'objet du présent Arrangement."

Un second accord a 6t6 sign6 en 1923 [21] et modifié à Lake Success en 1947 [22] : il s'agit de la Convention internationale pour la répression de la circulation et du trafic des publications obscênes. Cette convention est plus explicite que l'Arrangement de 1910 et s'intéresse directement à la découverte, la poursuite et la condamnation des auteurs d'infractions. L'article ler institue en infraction le fait :

"l. De fabriquer ou de détenir des écrits, dessins, gravures, peintures, imprimés, images, affiches, emblèmes, photographies, films cinématographiques ou autres objets

Enfin, et c'est probablement là l'élément le plus important, deux articles ont une incidence directe sur la législation provinciale: l'article 16 concernant la prévention de la prostitutées et prostitution et la rééducation des prostituées et placement. L'article 20 concernant la surveillance des agences de placement. L'article 16 se rapporte à la compétence des provinces en matière d'éducation, de santé publique et d'administration de la justice. L'article 20 a trait aux agences de placement fédérales et provinciales et, à ce titre, exigerait la tenue de consultations avec les provinces.

la délégation canadienne à invoqué les motifs suivants :

(1) La résolution était fondamentalement sexiste,
puisqu'elle tenait pour acquis que seules les femmes
peuvent se livrer à la prostitution ou faire l'objet de

(2) Plutôt que de favoriser l'égalité des femmes, la résolution impliquait que celles-ci doivent être protégées.

fraite;

Au surplus, cette résolution considérait la prostitution comme étant un problème limité aux femmes, alors que le Canada se préoccupe également de la prostitution des enfants et n'est, par conséquent, pas en faveur d'une résolution ne traitant que de la prostitution des femmes.

En résumé, la législation du Canada, en ce qu'elle est axée sur la lutte contre l'exploitation de la prostitution, se trouve dans l'ensemble conforme aux accords internationaux adoptés jusqu'à tout récemment par les Nations Unies. Le système fédéral du pays, le partage des compétences qui en découle et la prudence suscitée par une terminologie parfois vague et trop large sont au nombre des raisons qui ont amené le Canada à ne pas signer la Convention de 1949 et la Résolution de 1984. Néanmoins, le fait que le Canada ait sésolution de 1984. Néanmoins, le fait que le Canada ait sésolution de la sur l'élimination de 1979 (laquelle a signe de discrimination à l'égard des femmes de la prosticit de discrimination à l'égard des femmes et tution) et qu'il soit partie à la plupart des accords précédents en matière d'esclavage et de traite des femmes et précédents en matière d'esclavage et de traite des femmes et précédents en matière d'esclavage et de traite des femmes et précédents en matière d'esclavage et de traite des femmes et

portée de ces infractions). article (d'autant plus qu'on déplore parfois la très grande question, soit formuler des réserves à l'égard de cet pourrait soit modifier les dispositions législatives en 1949. Afin de se conformer à l'article 8, le Canada obligations créées par l'article 8 de la Convention de 1921, cela ne suffit pas pour s'acquitter de toutes les Bien que le Canada soit partie aux conventions de 1910 et pas une portée assez large pour comprendre le proxénétisme. sexe teminin, prevue à l'article 248 du Code criminel, n'a nant l'extradition. La notion de rapt d'une personne de mentionnent le "proxénétisme" parmi les infractions entraîproxénétisme constitue une infraction donnant lieu à extra-dition. Cependant, ni la partie I, ni la partie II de la Loi sur l'extradition du Canada (S.R.C. 1970, chap. E-21) ne from. Pour prendre un exemple, l'article 8 établit que le de gouvernement) l'obligeraient à modifier cette législarelevant de la compétence des provinces ou des deux paliers fédéral) et les articles 16 et 20 (relativement aux lois 19 et 21 (relativement aux lois relevant de la compétence du Si le Canada signait la Convention, les articles 8, 14, 15,

condamnations. aux Etats de fournir des renseignements au sujet des ces infractions. La Convention de 1921 imposait seulement retus d'admission ou expulsions des personnes coupables de sur Jes recherches, poursuites, arrestations, condamnations, toutes précisions concernant les infractions, et notamment fait obligation aux parties de fournir aux autres États blanches de 1904. Dans le même ordre d'idées, l'article 15 contre le trafic criminel connu sous le nom de traite des international en vue d'assurer une protection efficace exigence en se conformant à l'article ler de l'Arrangement Convention. Le Canada satisfait déjà à une partie de cette relatives aux infractions prévues par l'article 8 de la un service de renseignements concernant les recherches L'article 14 oblige les États parties à créer et à maintenir

Tois, les réglements et les mesures d'application de la communidater au Secrétaire général des renseignements sur les bins, l'article 21, aux termes duquel les Etats doivent plus particulièrement du paragraphe b) de cet article. De de l'article 66 de la Loi sur l'immigration de 1976, et tion, le Canada devrait étendre la portée des dispositions rapatriement prevues par le paragraphe 19(2) de la Conven-Afin d'être à même de mettre en oeuvre les mesures de

bratidues. Convention, obligerait également le Canada à modifier ses

1.3 Position du Canada

Le Canada est partie aux accords suivants: l'Arrangement international en vue d'assurer une protection efficace contre le trafic criminel connu sous le nom de traite des blanches (1904), la Convention internationale relative à la répression de la traite des blanches (1910), le Protocole amendant l'Arrangement de 1904 et la Convention de 1910 (1949), la Convention internationale pour la répression de la traite des convention internationale pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des smendant la Convention pour la répression de la traite des femmes et des enfants intervenue en 1921 (1947).

Cependant, le Canada n'est pas partie à la Convention internationale relative à la suppression de la traite des femmes majeures (1933), au Protocole d'amendement de cette Convention (1947), à la Convention pour la répression de la traite des êtres humains et de l'exploitation de la prostitution d'autrui (1949) et à son Protocole de clôture.

Il a été plus d'une fois soutenu que le Canada étant partie à tous les accords antérieurs à 1949 (à l'exception de la Convention de 1933) et à la Convention à l'égard des femmes de toutes les formes de discrimination à l'égard des femmes de 1979, et que la Convention de 1949 constituant essentiellement une refonte des accords précédents [18], il n'est pas indispensable que le Canada devienne partie à cette dernière convention.

La lègislation applicable en la matière. cette convention sans apporter de nombreuses modifications à ne pourrait se conformer aux principales dispositions de niveau international. Au surplus, il apparaît que le Canada dans la façon d'envisager le problème de la prostitution au considérée apporte donc des éléments tout à fait nouveaux femmes dans nos sociétés contemporaines. La convention genérale, les inégalités économiques qui affectent les d'autrui (c'est-à-dire les proxénètes) et, de façon plus la clientèle masculine, ceux qui exploitent la prostitution Timite pas aux femmes prostituões, mais concerne également tion met l'accent sur le fait que la prostitution ne se part, par la nouvelle terminologie utilisée, cette convendes criminelles comme c'est le cas présentement. D'autre destinée à rééduquer les prostituées plutôt que d'en faire tion de la prostitution d'autrui et énonce une politique tion de 1949 introduit la notion de lutte contre l'exploitaeffet, comme nous l'avons mentionné précédemment, la Conven-L'argument de la refonte nous apparaît contestable.

de leur assujettisement à l'obligation de soumettre une déclaration d'impôts, mesures qui accompagnent habituellement les lois abolitionnistes [17]. Il semble donc que même dans les pays qui privilégient la lutte contre l'exploitation de la prostitution, l'adoption d'une politique nationale cohérente et adéquate reste un projet plutôt qu'une réalité.

l'égard des différents textes qui ont été adoptés. cette question lors de l'étude de la position du Canada à tation de la prostitution d'autrui et toutes les formes de traite des êtres humains" (art. ler). Nous reviendrons sur législatives, pour lutter contre la prostitution, l'exploimesnres unmanifaires appropriées, y compris des mesures "Demande instamment aux Etats Membres de prendre toutes les résolution (A/RES/38/107; Prévention de la prostitution) qui surcroît, l'Assemblée générale a récemment adopté une entre les politiques nationales et internationales. De et social (1983/30) reconnaissent l'existence de cet écart spécial et la résolution subséquente du Conseil économique is societe. Le rapport présenté en 1983 par le Rapporteur chances égales de bénéficier des ressources et richesses de l'égalité complète des hommes et des femmes, la possibilité pour les femmes de trouver un emploi décent et d'avoir des toutes les formes de discrimination à l'égard des femmes, principaux accords, ces mesures impliquent l'élimination de prostitution. Lorsqu'on les examine à la lumière des autres tuées, se retrouve rarement dans les lois nationales sur la mesures destinées à favoriser la rééducation des prostiexploitation (proxénétisme) et par la mise sur place de 1949, soit d'abolir la prostitution par l'élimination de son Le but que visaient les Nations Unies par la Convention de

On peut résumer en disant que l'objet des résolutions et accords adoptés par la Société des Nations et, plus tard, par les Nations Unies a changé avec le temps : la lutte contre l'esclavage et la traite des femmes et des enfants au niveau international a laissé place à la recherche de l'égalité des femmes, au respect des droits humanitaires des femmes et des enfants et à l'élimination de l'exploitation de la prostitution d'autrui. Il est difficile de déterminer de la prostitution d'autrui. Il est difficile de déterminer de la prostitution d'autrui. Il est difficile de déterminer au plan international et, de toute façon, cette question n'entre pas dans le cadre de cette brève étude. Nous n'entre pas dans le cadre de cette brève étude. Nous n'entre pas dans le cadre de cette brève étude. Nous penterons toutefois de cerner la position du Canada sur le sujet.

question du fichage des prostituées par la police et forces policières. Cette attitude soulève également la publique demeure le principal champ d'intervention des tion, il reste que dans les faits le racolage sur la voie et que l'accent est mis sur la répression de son exploitaque la prostitution, quoiqu'inacceptable, n'est pas prohibée adhéré à la Convention de 1949. Car même s'ils prétendent l'exploitation de la prostitution, qu'ils aient ou non majorité des pays dont les efforts visent à lutter contre Il est du reste permis de penser que tel est le cas de la aspect ou sous un autre les dispositions de la Convention. leurs lois ou leurs méthodes d'intervention violent sous un Pologne sont reconnus comme abolitionnistes. Cependant, signataires comme la France, l'Albanie, la Roumanie et la exposent aux rigueurs de la loi. Enfin, d'autres pays quées dans ce commerce, y compris la prostituée, s'y tenants du prohibitionnisme et toutes les personnes implil'Inde, la Yougoslavie, le Danemark et l'Algérie, sont des de l'Equateur et du Maroc). D'autres tels que l'U.R.S.S., (c'est le cas notamment du Mexique, du Venezuela, du Brésil, tution qui, en un sens, se trouvent à sanctionner celle-ci de la Convention ont adopté des lois réglementant la prosticourant abolitionniste Cependant, certains pays signataires De toute évidence, la Convention de 1949 se rattache au

"tout en considérant la prostitution comme incompatible avec la dignité de la personne humaine, ne l'interdit pas, car il la considère comme un choix personnel, donc comme une affaire privée; il cherche, en revanche, à abolir son exploitation." [ibid.]

Dans son rapport, M. Fernand-Laurent groupe selon trois catégories les interventions législatives que différents pays ont adoptées pour lutter contre la prostitution. Il distingue d'abord le "prohibitionnisme", qui condamne la prostitution en elle-même et, dans la répression de celle-ci, fait habituellement preuve de discrimination à l'endroit des prostituées en punissant rarement le client. Vient ensuite le "réglementarisme", qui tolère la prostitution mais en régit les manifestations, ce qui a pour effet "d'enfermer la personne prostituée dans une position may prostitution mais en régit les manifestations, ce qui a pour effet "d'enfermer la personne prostituée dans une position mais en régit les manifestations, ce qui a pour l'endermer la personne prostitue.

les États mettent leurs lois et leurs pratiques administratives en accord avec les principes posés par les résolutions.

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dispositions législatives, pour réprimer sous toutes leurs formes, le trafic des femmes et l'exploitation de la prostitution des femmes."

Dans son livre intitulé **Legal Effects of United Nations** Resolutions, J. Castaneda écrit ce qui suit à propos de la **Déclaration universelle des droits de l'homme :**

"Il ne s'agit pas d'un texte à valeur contraignante qui créerait des obligations pour les États; on ne peut non plus prétendre qu'il s'agit d'un texte reprenant des

usages préexistants." [15]

usages préexistants." [15]

usages préexistants." [15]

La situation est cependant plus complexe qu'elle ne peut le sembler à première vue. Il convient en effet d'observer que si les résolutions adoptées par les Nations Unies ne prévalent pas sur la législation des États, il n'en demeure pas moins que:

"I'on s'attend fortement à ce que les membres de la communauté internationale s'y conforment. Par conséquent, dans la mesure où les États se plient progressivement à une résolution, celle-ci peut à la longue acquérir la valeur d'un usage et, en conséquence, les acquérir la valeur d'un usage et, en conséquence, les règles qu'elle définit en arriver à être considérées comme obligatoires." [16]

Bien que la question de la valeur contraignante de la Déclaration ne soit pas encore résolue en droit international, on considêre néanmoins que ce texte a de plus en plus pour effet de créer des obligations coutumières. Quoi qu'il en soit, la Déclaration est l'expression d'un "idéal commun" [Castaneda, op. cit., p. 195] et la manifestation concrète de la volonté des États parties de considérer ces droits fondamentaux comme faisant dorénavant partie du domaine international. La Déclaration renforce par conséquent l'opinion que les droits de l'homme "n'échappent plus au droit international et ne sont donc plus à l'abri d'une droit international et ne sont donc plus à l'abri d'une intervention internationale" [ibid.]. Ce raisonnement s'applique encore mieux aux résolutions et aux conventions s'applique encore mieux aux résolutions et aux conventions limitée que la Déclaration universelle des droits de limitée plus limitée que la Déclaration universelle des droits de limitée plus des droits de limitée que la Déclaration universelle des droits de limitée plus de la Déclaration universelle des droits de limiter de l'homme l'homme l'homme l'homme l'homme l'homme l'appriment la prostitution, celles-ci ayant une portée plus limitée que la Déclaration universelle des droits de l'homme l'ho

En fait, les résolutions relatives à la traite des femmes et des enfants et à l'exploitation de la prostitution d'autrui ne s'imposent pas aux États avec la même force que les conventions. Là encore cependant, l'on s'attend à ce que

I.2 Portée des accords

Ces accords doivent être lus en relation avec la Charte internationale des droits de l'homme [11] (qui comprend la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits culturels et le Pacte international relatif aux droits civils et politiques [12]), la Convention aur l'élimination de toutes les formes de discrimination à l'égard des femmes adoptée en 1979 [13] et la Convention relative à l'esclavage intervenue en 1926 [14].

La Déclaration universelle des droits de l'homme détermine en son article 4 que "Nul ne sera tenu en esclavage ni en servitude : l'esclavage et la traite des esclaves sont interdits sous toutes leurs formes." Pour sa part, l'article 16 réaffirme que la famille est l'élément naturel et fondamental de la société. Quant aux articles 22, 23 et et fondamental de la société. Quant aux articles 22, 23 et sociale et culturelle qui doit être assuré par le travail et sociale et culturelle qui doit être assuré par le travail et les services sociaux.

la prostitution. dans l'étude des résolutions et des conventions relatives à physique et mentale, doivent également être pris en compte droit a un niveau de vie suffisant et le droit à la santé Les articles 11 et 12, qui reconnaissent respectivement le etre proteggs contre l'exploitation économique et sociale." même article énonce que "Les enfants et adolescents doivent l'élément fondamental de la société et le paragraphe 3 de ce paragraphe 1 de l'article 10 reconnaît que la famille est cela peut être considéré comme une forme de travail. Le droit pour les prostituées d'exercer leur métier, puisque femmes à l'égalité des chances dans l'emploi et à celui du semble-t-il être invoqué à la fois au soutien du droit des intéressant de remarquer que cet article pourrait librement choisi ou accepté" (art. 6, par. 1). Il est d'obtenir la possibilité de gagner sa vie par un travail travail, ce qui "comprend le droit qu'a toute personne economiques, sociaux et culturels reconnaît le droit au De la même façon, le Pacte international relatif aux droits

La Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes réaffirme quant à elle le principe de l'égalité des hommes et des femmes dans tous les domaines et invite notamment les États parties à "Abroger toutes les dispositions pénales qui constituent une discrimination à l'égard des femmes" (art. 2g). Par ailleurs, l'article 6 prévoit que "Les États parties ailleurs, l'article 6 prévoit que "Les États parties prennent toutes les mesures appropriées, y compris des

proxénétisme et d'exploitation. La résolution en cause invite également les États Membres à "signer, ratifier et mettre en application la Convention internationale pour la répression de la circulation et du trafic des publications obscènes" (art. 2). Nous analyserons d'ailleurs cette convention dans la partie sur la pornographie. Pour l'instant, nous soulignerons simplement que la résolution recommande aux États Membres d'élaborer des politiques tendant à:

la Prévenir la prostitution par l'éducation morale et
la formation civique, à l'école et en dehors de
l'école;

b) Augmenter le nombre des femmes parmi les agents de l'État qui sont en contact direct avec les populations concernées;

c) Eliminer les discriminations qui marginalisent les sociale plus difficile;

d) Freiner l'industrie et le commerce de la pornogras'y trouvent impliqués;

e) Réprimer d'une manière dissuasive le proxénétisme sous toutes ses formes, surtout quand il exploite des mineurs;

f) Faciliter la formation professionnelle et la réinsertion sociale des personnes sauvées de la prostitution;"

Ce survol historique nous permet de voir que la Convention de 1949 marque un tournant dans la manière d'aborder le problème. En effet, alors que les accords précédents traitaient de la répression de la traite des femmes et des enfants, cette convention met l'accent sur les victimes de la prostitution et provénétisme et les autres formes d'incitation de la prostitution, non seulement au niveau d'incitation à la prostitution, non seulement au niveau d'incitation à la prostitution, non seulement au niveau international mais également dans chacun des États. À cet égard, tout en reconnaissant que ses conventions ne peuvent fixer d'une manière absolue le contenu de la législation des États, les Nations Unies ont néanmoins exercé des pressions sur ces derniers afin d'éviter qu'ils n'adoptent des lois aux ces derniers afin d'éviter qu'ils n'adoptent des lois interdisant la prostitution en elle-même.

l'exploitation et la traite des êtres humains. developpement economique et, d'autre part, la prostitution, concrètes concernant la relation entre, d'une part, le traitement des délinquants à faire des recommandations Congres des Nations Unies sur la prévention du crime et le Cette résolution invitait également le Sixième causes et les conditions socio-économiques qui la favorifournir un rapport sur la prostitution dans le monde, ses resolution demandant entre autres au Secrétaire général de femme qui s'est tenue à Copenhague en 1980, a adopté une Conférence mondiale de la Décennie des Mations Unies pour la favorisant la rééducation des prostituées. De plus, la traite des femmes, et de mettre de l'avant des mesures efforts afin de mettre fin à la prostitution forcée et à la demandant instamment aux gouvernements d'augmenter leurs l'Année internationale de la femme a adopté une résolution Commission. En 1975, à Mexico, la Conférence mondiale de diverses recommandations qui ont êté ratifiées par la

chargé M. Jean Fernand-Laurent de présenter un rapport sur le sujet [10]. Ce rapport, qui a été publié en 1983, a par recommandation, le Secrétaire général des Nations Unies a Suite a cette soit soumise à l'Assemblée générale. qu'une proposition visant à nommer un rapporteur spécial ment, dans sa résolution 1982/14, la Commission a recommandé réaffirmé son désir qu'un tel rapport soit réalisé. Finalerapport concernant l'application de la Convention de 1949 et Secrétaire général d'expliquer pourquoi il n'existait aucun huitieme session, adopte une résolution demandant au Commission de la condition de la femme a, lors de sa vingtdemande dans sa résolution 1980/4. Egalement en 1980, la ment. Le Conseil économique et social a réitéré cette socio-economiques susceptibles d'en favoriser le développetes consèquences de la prostitution et sur les conditions Convention de 1949 de même qu'un document sur les causes et sonmettre un rapport concernant la mise en oeuvre de la prostitution d'autrui et demandant au Secrétaire général de (XXVII) condamnant "l'exploitation scandaleuse" de la la condition de la femme a adopté une résolution (1978/l En 1978, lors de sa vingt-septième session, la Commission de

la suite mené à l'adoption par le Conseil économique et social de la Résolution 1983/30 relative à la Lutte contre la traite des êtres humains et l'exploitation de la prosti-tution d'autrui. Cette résolution invite formellement les Etats Membres à "signer, ratifier et mettre en application la Convention relative à la répression de la traite des êtres humains et de l'exploitation de la prostitution d'autrui" (art. let). Elle réaffirme ainsi les principes d'autrui" (art. let). Elle réaffirme ainsi les principes des posés par cette convention en ce qui concerne la rééducation des prostituées et la répression de toutes les formes de des prostituées et la répression de toutes les formes de

prostituées étaient également nécessaires pour lutter effila prévention de la prostitution et à la rééducation des repression de l'exploitation de la prostitution d'autrui, à public, à la prévention des maladies vénériennes, à la D'autres mesures destinées notamment au maintien de l'ordre des systemes de contrôle ne devait être qu'un premier pas. vênérienne. Le rapport soulignait de plus que l'abolition responsable que d'un faible pourcentage des cas de maladie tion en la matière démontraient que la prostitution n'était les études menées dans les pays ayant aboli leur réglementa-De façon plus précise, ce rapport affirmait clairement que tion de la prostitution et la rééducation des prostituées. mesures destinées à encourager plus énergiquement la prévenques et sociales a réalisé un rapport proposant une série de la prostitution d'autrui". En 1959, à la demande du Conseil économique et social, le Département des affaires économicombattre le proxénétisme, c'est-à-dire "l'exploitation de le but de réaffirmer la détermination des Nations Unies à depuis. D'autres dispositions ont cependant êté prises dans Aucun autre accord relatif & la prostitution n'est intervenu

It convient de noter ici un certain paradoxe. En effet, le rapport favorise la suppression des contrôles et refuse de considérer la prostitution comme étant un acte délictueux, mais en même temps, à la fois par souci de maintenir l'ordre mais en même temps, à la fois par souci de maintenir l'ordre public et de prévenir la prostitution, affirme ce qui suit :

cacement contre la traite des êtres humains.

"Dans la mesure où le racolage sur la voie publique nuit à l'intérêt général, il faut l'interdire si l'on veut sauvegarder l'ordre et la moralité publics. Il convient cependant que l'interdiction de l'incitation publique à la débauche relève de la loi et non de règlements d'administration ou de police. [9]"

En somme, la prostitution devrait n'être ni réprimée ni tolérée. Dans les années subséquentes, l'Assemblée générale des Nations Unies devait donc inciter les États membres à atteindre ce difficile équilibre entre l'abolition de la prostituées.

Deux organismes des Nations Unies, la Commission des droits de l'homme et la Commission de la condition de la femme, ont travaillé de façon conjointe sur la question de la prostitution et de la traite des êtres humains. En 1974, un Groupe de travail sur l'esclavage, institué par la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités de la Commission des droits de l'homme, a assimilé la traite des femmes et des enfants à l'homme, a sesimilé la traite des femmes et des enfants à une forme d'esclavage. Le Groupe de travail a formulé

Cette convention internationale a été la première à condamner clairement la prostitution en tant que telle. Ce qui revêt cependant beaucoup plus d'importance, c'est le remplacement du mot "femmes" par l'expression "êtres humains"; on limite pas seulement aux femmes mais qu'elle concerne tous limite pas seulement aux femmes mais qu'elle concerne tous lemmes qui se livrent à la prostitution et qui subissent cette forme d'exploitation. L'utilisation de l'expression cette forme d'exploitation, L'utilisation de l'expression me fait aucune distinction de sexe, de race, de religion, ne fait aucune distinction de sexe, de race, de religion, etc.

Les articles l et 2 précisent la portée de ce préambule :

"Article 1 - Les Parties à la présente Convention conviennent de punir toute personne qui, pour satisfaire les passions d'autrui : l. Embauche, entraîne ou détourne en vue de la prostitution une autre personne, même consentante; 2. Exploite la prostitution d'une autre personne, même consentante.

Article 2 - Les Parties à la présente Convention conviennent également de punir toute personne qui : l. Tient, dirige ou, sciemment, finance ou contribue à financer une maison de prostitution;

2. Donne ou prend sciemment en location, en tout ou en partie, un immeuble ou un autre lieu aux fins de la prostitution d'autrui."

reclassement des victimes de la prostitution" (art. 16). prevenir la prostitution et à assurer la rééducation et le du'ils soient publics ou privés, les mesures propres à q, euserduemeur' q, pldigue er antres services connexes' par l'intermédiaire de leurs services sociaux, économiques, Etats signataires "conviennent de prendre ou d'encourager, surveillance ou de déclaration" (art. 6). En outre, les ou se conformer à des conditions exceptionnelles de doivent "se faire inscrire sur des registres spéciaux (...) u,λ s best tren de prévoir que les personnes qui s'y livrent considere la prostitution comme un mal, on y reconnaît qu'il proxenètes et autres entremetteurs). Même si la Convention exploitent "la prostitution d'autrui" (c.-à-d. les mesures repressives qu'à l'endroit des individus qui Jes parties signataires conviennent de ne prendre des Sulvant ces deux articles ainsi que les articles 6 et 16,

aux infractions (art. 3); un nouvel âge limite de "vingt et un ans révolus" (art. 5); et des dispositions particulières concernant l'extradition des contrevenants (art. 4), la protection des femmes et des enfants cherchant du travail dans un autre pays (art. 6) et les mesures de contrôle (art. 7).

Le Conseil de la Société des Nations constitua deux comités spéciaux formés d'experts chargés de faire rapport sur la situation entourant le trafic international des femmes et des enfants. L'enquête de 1927 a conclu que "L'existence des maisons de tolérance constitue incontestablement un stimulant de la traite, tant dans le domaine national que dans le domaine international." [5] En s'appuyant sur les mêmes sources mais avec un mandat élargi, le comité de 1932 a conclu dans le même sens : "le facteur qui contribue le plus au développement de la traite internationale des femmes en Orient est la maison de tolérance", [6]

En 1933, fut signée à Genève la Convention internationale relative à la suppression de la traite des femmes majeures . Bien que cette convention soit, de façon générale, semblable aux conventions précédentes de 1910 et 1921, l'on a sjouté une disposition permettant de façon explicite aux pays signataires de se communiquer des renseignements au sujet des infractions commises, des contrevenants et des mesures de refoulement ou d'expulsion (art, 3) prises en taison d'infractions commises sur leur territoire ou sur le territoire des pays soumis à leur autorité (art, let),

Lors de la création des Nations Unies en 1945, les conventions de 1921 et de 1933 ont êté reconduites par le Protocole amendant la Convention internationale pour la répression de la traite des femmes et des enfants (...), signé à Lake Success, New York, le l2 novembre 1947 [7]. Ce protocole ne modifie pas la substance des accords précédents, mais il transfère les pouvoirs qui en découlent au Secrétaire général des Nations Unies et aux pays membres de cette organisation.

En 1949, l'Assemblée générale des Nations Unies adopta la Convention pour la répression de la traite des êtres humains et de l'exploitation de la prostitution d'autrui [8]. Le préambule de cette convention énonce ce qui suit :

"Considérant que la prostitution et le mal qui l'accompagne, à savoir la traite des êtres humains en vue de la prostitution, sont incompatibles avec la dignité et la valeur de la personne humaine et mettent en danger le bien-être de l'individu, de la famille et de la communauté (...)"

I - ACCORDS EN MATIERE DE PROSTITUTION

I.1 Historique

Le premier accord international relatif à la prostitution a été signé en 1904. Il s'agit de l' Arrangement internation efficace contre le trafic criminel connu sous le nom de traite des blanches l'affic criminel connu sous le nom de traite des blanches [1]. Ce texte s'intéresse principalement à "l'embauchage des femmes et filles en vue de la débauche à l'étranger" (art. ler). Les gouvernements s'y engagent : à augmenter leur surveillance dans les gares, les ports et en cours de voyage (art. 2); à interroger les prostituées, dans la mesure où la loi le permet, afin d'identifier ce qui "les a déterminées à quitter leur pays" (art. 3); à confier ces jusqu'à leur rapatriement (id.); à organiser leur privée jusqu'à leur rapatriement (id.); à organiser leur rapatriement (id.); à organiser leur ces jusqu'à leur rapatriement (id.); et, au besoin, à supporter les frais cocasionnés par leur rapatriement (art. 4).

exclusivement de la législation intérieure" (partie D). on IIIle dans une maison de débauche, puisque cela "relêve pas du problème de la détention, contre son gré, d'une femme "vingt ans accomplis" (partie B). La Convention ne traite filles majeures comme étant celles ayant atteint l'âge de majeures. Le protocole de clôture définit les femmes ou autre moyen de contrainte à l'endroit de femmes ou filles & la violence, aux menaces, & l'abus d'autorité ou & tout jorsque, dans le même but, quelqu'un a recours à la fraude, pays différents." L'article 2 crée une infraction semblable constitutifs de l'infraction auraient été accomplis dans des alors même que les divers actes qui sont les éléments ment, une femme ou fille mineure, en vue de la débauche, a embauché, entraîné ou détourné, même avec son consenteêtre puni quiconque, pour satisfaire les passions d'autrui, L'article ler de cette convention énonce que "Doit signée à Paris en 1910 et ratifiée par la Grande Bretagne en relative & la répression de la traite des blanches [2], Cet arrangement a été suivi par la Convention internationale

Deux autres conventions internationales ont été signées avant la dissolution de la Société des Nations, soit la Convention internationale pour la répression de la traite des femmes et des enfants de 1921 [3] et la Convention internationale relative à la suppression de la traite des femmes majeures de 1933 [4]. La Convention de 1921, destinnée à "assurer d'une manière plus complète la répression de la traite des femmes et des enfants", modifiait l'Arrange— la traite des femmes et des enfants in modifiait l'Arrange— ment de 1904 et la Convention de 1910 de façon à inclure : ment de 1904 et la Convention de 1910 de façon à inclure :

INTRODUCTION

Le Comité spécial sur la pornographie et la prostitution créé par le ministère de la Justice avait notamment pour mandat d'"étudier, sans sortir du Canada, l'expérience des autres pays, ainsi que les tentatives de régler ces problèmes (la pornographie et la prostitution), notamment aux Etats-Unis, dans la Communauté économique européenne et dans certains pays désignés du Commonwealth comme l'Australie et la Nouvelle-Zélande".

D'autres rapports, réalisés dans le cadre du programme de recherches mené en la matière par le ministère de la Justi-ce, traiteront de la situation de certains pays en particulier. Pour sa part, le présent rapport examinera les politiques adoptées au niveau international. En effet, il nous a semblé important que les positions prises par les organismes internationaux fassent également l'objet de notre corganismes internationaux fassent syllement porté notre attention du côté de l'Organisation des Nations Unies et des attention du côté de l'Organisation des Mations Unies et des actention du côté de l'Organisation des Mations Unies et des actention du côté de l'Organisation des Mations Unies et des actention du côté de l'Organisation des Mations Unies et des organismes qui lui sont affiliés, tels que le Conseil connemique et social.

Depuis le début du siècle, la Société des Nations et, par la suite, les Nations Unies ont adopté des résolutions et des accords visant à réglementer la prostitution et la pornographie au plan international. Bien que, comme nous le verrons plus loin, tous ces textes ne possèdent pas la même force ni la même valeur juridique contraignante par rapport à la pour les parties signataires un ensemble de principes communs. L'examen de ces textes permet d'abord de constater communs. L'examen de ces textes permet d'abord de constater années. Mais il permet également de juger des politiques années. Mais il permet également de juger des politiques intérieures des États au regard des positions qu'ils ont intérieures des Etats au regard des positions qu'ils ont adoptées à ce sujet dans les instances internationales.

Dans ce bret rapport, nous examinerons en premier lieu l'évolution et la portée de ces textes de même que la position du Canada à l'égard des accords des Nations Unies en matière de prostitution. Dans la seconde partie, nous aborderons la question de la pornographie. En conclusion, nous soulignerons les éléments les plus importants des nous soulignerons les éléments aux politiques intérieures canadiennes sur ces questions.

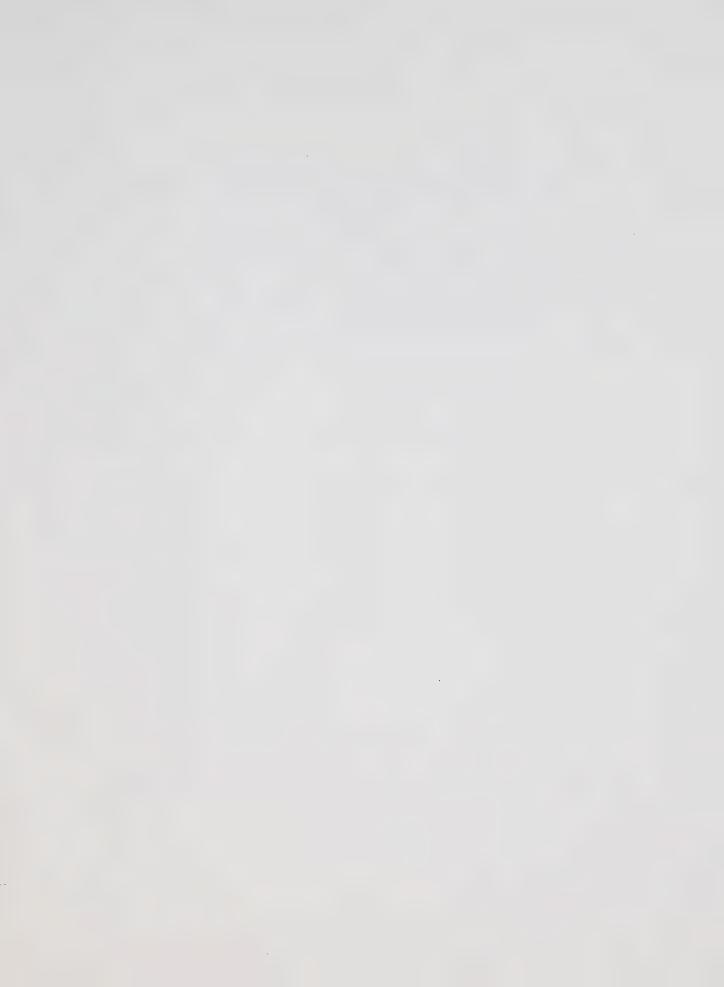
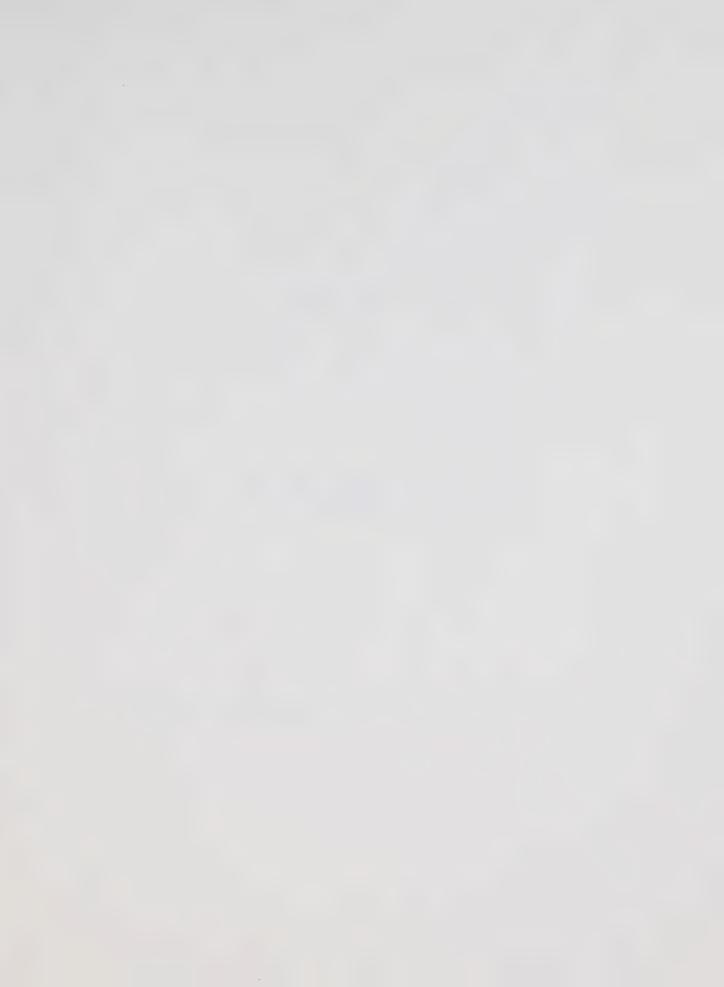


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ACCORDS ET RESOLUTIONS PRIS PAR LES NATIONS UNIES RELATIVEMENT À LA PROSTITUTION ET À LA PORNOGRAPHIE

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1984 niul



DOCUMENTS DE TRAVAIL SUR LA PROSTITUTION PORNOGRAPHIE ET LA PROSTITUTION

Rapport # 3

ACCORDS ET CONVENTIONS DES NATIONS-UNIES SUR LA PORNOGRAPHIE ET LA PROSTITUTION

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